Comcast Cablevision of Philadelphia, L.P. *and* Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Cases 4–CA–19155, 4–CA–19451, 4–CA–19569, and 4–RC–17321

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 28, 1992, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a brief in support, a reply brief, and an answering brief. The General Counsel filed cross-exceptions with a brief in support and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt his recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Comcast Cablevision of Philadelphia, L.P., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(f).

''(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding that the Respondent violated Sec. 8(a)(1) by interrogating employees about the Union, we rely only on those instances in which the Respondent's officials interrogated employees who were not open union supporters. We find it unnecessary to pass on the judge's other findings of unlawful interrogation as such findings would be cumulative.

The General Counsel has excepted to the judge's failure to include Area Director of Engineering Donahue's name in the last paragraph of sec. I,B,1,b(2) of his decision and to his substitution of employee Heath's name for that of employee Stevenson in sec. I,B,1,b(3) of his decision. We correct these inadvertent errors. In addition, we note that the judge incorrectly spelled the name of employee Eric Funchess throughout his decision. Finally, in the first paragraph of the judge's decision, ''Local No. 15'' should read ''Local No. 115.''

In adopting the judge's findings, we do not rely on his statement with regard to hiring nonlawyers to coach supervisors during union organizational campaigns.

[3] In sec. I,B,1,c of his decision, the judge concluded that the Respondent violated Sec. 8(a)(1) by instructing employees not to wear union buttons. In making this finding, the judge stated that he was relying on his earlier finding that ''Donahue and Brandt instructed employees not to wear union buttons.'' We note, however, that at sec. I,A,2,b of his decision, the judge credited Brandt's testimony that ''he did not instruct the employees to remove the Union buttons; rather, he told them that the buttons violated the company's 'uniform policy' and asked, apparently rhetorically, if they thought they should nevertheless wear them.'' Even assuming that the events occurred as Brandt testified, we would still find a violation. In this regard, we find that although Brandt may not have directly instructed employees to remove their union buttons, the employees could infer only one answer to Brandt's ''rhetorical question'' in the circumstances here, where Brandt stated that the wearing of such buttons was against the Respondent's ''uniform policy'' immediately before he posed his ''rhetorical question.''

[4] The General Counsel has excepted to the judge's failure to include a general cease-and-desist provision in his recommended Order. The General Counsel contends that at minimum the Order should include narrow ''in any like or related manner'' language to permit effective enforcement of the Board's Order, but that given the seriousness and number of the Respondent's unfair labor practices, a broad order requiring the Respondent ''to cease and desist from 'in any other manner restraining or coercing employees' is fully justified.'' We find merit in the General Counsel's exception to the judge's failure to include in his recommended Order a general cease-and-desist provision. We agree with the General Counsel's contention that in the circumstances present here a broad cease-and-desist provision is fully justified. See *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, we shall modify the judge's Order to include a broad cease-and-desist provision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT grant to you wage increases or wage reviews in order to discourage you from becoming or remaining members of, or giving assistance or support to, Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT promise to grant to you direct payroll bank deposit benefits, promotions, or any other benefits in order to discourage you from becoming or remaining members of, or giving assistance or support to, the Union.

WE WILL NOT interrogate you about your membership in, or preference or support for, the Union.

WE WILL NOT tell you that you may not wear while working union buttons or other indicia of your union support.

WE WILL NOT discharge you, or otherwise discriminate against you because of your union or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of all the employees in the bargaining unit described below, and, if an understanding is reached, on request, embody such understanding in a signed agreement:

> All full-time and regular part-time installers, service technicians, construction technicians, QC technicians, QA technicians, line technicians, bench technicians, warehousemen, converter prep employees and vehicle technicians employed by us at our 11400 Northeast Avenue and at our 4400 Wayne Avenue, Philadelphia, Pennsylvania locations, excluding cost analysts, clerks, secretaries, dispatchers, bracket access coordinators, MDU coordinators, tech administrators and facilities clerks employed in the Engineering Department, Customer Service Department employees, Marketing/Sales Department employees, Human Resources Department employees, Advertising Sales Department employees, Accounting Department employees, Local Origination Department employees, guards and supervisors as defined in the Act.

WE WILL offer Lynetta Bennett, Carmen Favano, Eric Funchess, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges of Lynetta Bennett, Carmen Favano, Eric Funchess, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson, and WE WILL notify them, in writing, that this has been done and that their discharges will not be used against them in any way.

COMCAST CABLEVISION OF PHILADELPHIA, L.P.

Donna D. Richardson and *Richard Wainstein, Esqs.*, for the General Counsel.

James R. Redeker and *Claude I. Schoenberg, Esqs. (Wolf, Block, Schorr and Solis-Cohen)*, of Philadelphia, Pennsylvania, for the Respondent.

Norton H. Brainard III, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on eight dates between February 24 and March 4, 1992. The case revolves around an attempt by Teamsters Union Local No. 15, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union, the Charging Party, the Petitioner, or the Teamsters) to become certified under the Act as the collective-bargaining representative of certain employees of Comcast Cablevision of Philadelphia, L.P. (the Respondent or the Employer).

The Union filed a petition for the conduct of a representation election with the National Labor Relations Board (the Board) in Case 4–RC–17321 on March 22, 1990.[1] On July 13, the Regional Director issued a Decision and Direction of Election which found appropriate for purposes of collective bargaining under the Act the following employees of Respondent (the bargaining unit, or the unit):

> All full time and regular part time installers, service technicians, construction technicians, QC technicians, QA technicians, line technicians, bench technicians, warehousemen, converter prep employees and vehicle technicians employed by [the Respondent] at its 11400 Northeast Avenue and at its 4400 Wayne Avenue, Philadelphia, Pennsylvania locations, excluding cost analysts, clerks, secretaries, dispatchers, bracket access coordinators, MDU coordinators, tech administrators and facilities clerks employed in the Engineering Department, Customer Service Department employees, Marketing/Sales Department employees, Human Resources Department employees, Advertising Sales Department employees, Accounting Department employees, Local Origination Department employees, guards and supervisors as defined in the Act.

Respondent timely filed with the Board a request for review of the unit determination; however, before the Board could

[1] All dates are in 1990 unless otherwise indicated.

finally act on it, Respondent withdrew that request. The above unit determination is therefore final.[2]

On August 10, an election among the unit employees was conducted by the Board. The tally of ballots reflected 44 unit employees voted for, and 46 voted against, representation by the Union; there were no challenged ballots. The Union filed objections to conduct affecting the results of the election (the objections) on August 17.

The charge in Case 4–CA–19155 was filed by the Union on August 20. A notice of hearing on certain of the objections was issued by the Regional Director on November 20. On November 21, a complaint and notice of hearing issued in Case 4–CA–19155. An order consolidating cases and scheduling consolidated hearing in Cases 4–RC–17321 and 4–CA–19155 issued on November 28. The charge in Case 4–CA–19451 was filed by the Union on December 20. An order further consolidating cases and consolidated complaint and notice of hearing for Cases 4–CA–19155, 4–CA–19451, and 4–RC–17321 issued on February 27, 1991. The original charge in Case 4–CA–19569 was filed by the Union on February 12, 1991, and, on March 28, 1991, a complaint and notice of hearing issued in that case. Respondent duly filed answers that admitted jurisdiction and the status of certain supervisors under Section 2(11), but it denied the commission of any unfair labor practices.

An order consolidating cases, amended consolidated complaint and notice of hearing for the charges in Cases 4–CA–19155, 4–CA–19451, and 4–CA–19569, and further consolidating the objections in Case 4–RC–17321 issued on September 26, 1991. The amended consolidated complaint alleges that Respondent committed violations of Section 8(a)(1) and (3) of the Act; it further alleges (based of employee-signed designations of collective-bargaining representative allegedly secured by the Union) the majority status of the Union as the collective-bargaining representative of the unit employees, and it seeks the issuance of a bargaining order as a remedy for the alleged ''serious and substantial'' unfair labor practices. On October 10, 1991, the Respondent filed its answer to the amended consolidated complaint. In that document, Respondent admits the service of the charges, jurisdiction of the matter before the Board, the Union's status as a labor organization under Section 2(5), and the supervisory status of all individuals alleged to be either supervisors or agents of the Respondent under Section 2(11) or (13) of the Act; but, as well as the appropriateness of the bargaining unit,[3] Respondent denies the commission of any unfair labor practices; it denies the majority status of the Union; and it denies the appropriateness of the bargaining order remedy for any unfair labor practices that may have been committed. An amendment to amended consolidated complaint that was issued on January 30, 1992, alleges additional violations of Section 8(a)(1) of the Act. Respondent further denied those allegations.

The hearing was held on the allegations of the amended consolidated complaint and the amendment to the amended consolidated complaint (jointly as the complaint), the answers filed by Respondent (the answer), and the objections.[4]

[2] I reject Respondent's arguments to the contrary. See Sec. 102.67 of the Board's Rules and Regulations.

[3] See the preceding footnote.

[4] The objections are essentially congruent with the complaint's allegations of preelection violations.

I. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Corporate structure and supervisors involved

Comcast Corporation, an entity that is not joined as a Respondent in this case, employs more than 5000 employees in 68 cable television systems in 15 States of the United States. Comcast Corporation operates those systems through a corporate subsidiary, Comcast Cable Communications, Inc. (another non-Respondent) and various limited partnerships, one of which is the Respondent in this case. Comcast Corporation and Comcast Cable Communications, Inc. (jointly as Comcast) have their headquarters in downtown Philadelphia.

Comcast divides its operations into five corporate regions: Atlantic-Pacific, Northeast, Southeast, South Central, and Midwest. Each Comcast region has its own vice president. Within each Comcast region are various corporate areas; each corporate area has its own vice president (who, of course, is subordinate to the regional vice president). The Philadelphia area of Comcast's Atlantic-Pacific region is involved here.[5] The Comcast Philadelphia area is operated by Comcast Cablevision of Philadelphia, L.P., the Respondent in this case.[6]

For purposes of cable franchise regulation, the city of Philadelphia divides itself into quadrants. At the time of the August 10 election, Respondent held the franchises for two of these quadrants, northeast Philadelphia (designated by the city as cable franchise area 4) and northwest Philadelphia (area 3). Respondent received the franchise for area 4 directly from the city in the early 1980s; Respondent purchased the franchise for area 3 from another cable company in 1987.

Respondent's offices for area 4 are on Northeast Avenue in Philadelphia; its offices for area 3 are on Wayne Avenue; those facilities are referred to here as the ''Northeast facility'' and the ''Wayne Avenue facility,'' respectively. The unit employees work at, or out of, the Wayne Avenue facility and the Northeast facility.

Also, as will often be mentioned, Respondent operates two cable television systems in the Philadelphia suburbs of Lower Merion and Willow Grove.[7] That is, the Lower Merion and Willow Grove operations of Respondent are part of the Comcast Philadelphia area, but no employees at those locations are part of the unit.

In October 1988, Michael Doyle was appointed vice president of Comcast's Atlantic-Pacific region. At the same time, Joseph Hipple was appointed vice president of Comcast's Philadelphia area operations. Hipple remained in that position until mid-August 1989. On April 9, 1990, Tyrone (Ty) Conner was employed by Respondent to replace Hipple as

[5] Comcast's Atlantic-Pacific region also includes cable television systems in New Jersey and California.

[6] Respondent admits that, during the year preceding issuance of the complaint, its operations derived gross revenues in excess of $500,000, and purchased $50,000 worth of goods directly from suppliers located at points outside Pennsylvania. Therefore, Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[7] The name of these two Philadelphia suburbs are spelled in various ways in the transcript. The transcript is accordingly corrected.

Comcast's Philadelphia area vice president. Between Hipple's departure in August 1989, and Conner's employment in April 1990, Doyle also served as Comcast's acting Philadelphia area vice president.

In addition to Doyle and Conner, involved supervisors are:

Don Brandt—Technical Supervisor, Northeast Avenue
Randy Cicatello—Area Technical Operations Manager
Barbara Cummings—Customer Service Manager, Wayne Avenue
Michelle Davis—Dispatch Supervisor, Northeast Avenue
John Donahue—Area Director of Engineering
Michael Duncan—Construction Supervisor, Wayne Avenue
Lynn Green—Human Resources Manager, Northeast Avenue
Jeff Harris—Training Manager, Northeast Avenue
Paul Rawls—Technical Supervisor, Wayne Avenue
Jeff Tucker—Construction Supervisor, both facilities

In addition to Doyle, a Comcast executive who is involved in this case is Paul Gillert, senior corporate vice president for human resources. Another corporate executive who is involved is Al Calhoun; his precise position, as discussed infra, is not clear.

2. Alleged violative conduct

The organizational attempt involved here began in September 1989 when employee Richard Gardner, a construction technician, visited the Union's hall in Philadelphia to make inquiries. During that month, some of the employees attended meetings at the union hall and began distributing forms for authorizing the Union to act as the employees' collective-bargaining representative; these authorizations were in the form of individual authorization cards and ''petitions'' which were joint authorization forms.

Respondent denies that it had any knowledge of these organizational activities before December 1989. The issue of just when Respondent attained such knowledge is raised because a May 28 wage increase is the subject of both the complaint and the objections; Respondent defends that increase, in part, on the contention that it had no knowledge of the organizational attempt when it planned the increase.

The complaint and the objections also allege that, in opposition to the 1989–1990 Teamsters organizational attempt,[8] Respondent engaged in other conduct which, if proved, would establish several violations of Section 8(a)(1). The complaint further alleges that Respondent violated Section 8(a)(3) when it permanently laid off employee Lynetta Bennett on January 7, 1991, and that it further violated Section 8(a)(3) when, on February 8, 1991, it permanently laid off six employees classified as construction technicians; these employees are: Carmen Favano, Eric Funchness, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson.

[8] In 1988 there was an unsuccessful organizational attempt by the International Brotherhood of Electrical Workers.

In arguing the credibility issues relevant to these allegations, Respondent on brief makes much of the fact that the supervisors were strictly instructed not to interrogate or threaten employees, or engage in any other such violative activities. I do believe that such instructions have an ameliorative value and make violations less probable. However, I also believe that supervisors, like employees, sometimes violate instructions. Specifically, I believe that supervisors sometimes violate instructions such as those given here, whether because implicitly conflicting instructions have been issued,[9] or because the instructions are misunderstood,[10] or because, in a given case, a supervisor simply thinks that he can get away with it. Therefore, in each case, although I have carefully considered the fact that the supervisors received instructions not to violate the law, I have not considered that fact to be controlling.

The following sections of the narrative will be in chronological order of the allegations of the complaint (except where the proof established a different order of the chain of events).

a. *Union button prohibition by Donahue*

Paragraph 11(a) of the complaint alleges that Respondent, by Donahue, in violation of Section 8(a)(1):

> In or about March, 1990, a more precise date being presently unknown to the General Counsel,[11] directed employees to remove Union buttons from their uniforms.

Herman Heath, a current employee,[12] and one of the principal employee-organizers, testified that in ''[a]round March of 1990'' he and other line technicians worked out of both the Northeast and Wayne Avenue facilities, and they were often shuttled between the locations as a group. At that time, Heath testified, ''I wore a [L]ocal 115 button.'' At some point after the Teamsters organizational attempt began, according to Heath:[13]

> We arrived there, we walked around and I think John Donahue, who was in the office, he was the Director of Engineering at the time, he had saw some of us wearing the buttons and he called a meeting with the line techs, which was like maybe 14 people, it was like seven in the Northeast building, seven in the Wayne Avenue building. And he was a little disturbed or angry

[9] Respondent's consultant, Peddrick, conducted supervisory meetings in which running scores were kept on who was for the Union. Where such meetings are organized by an employer, there is the possibility that supervisors would feel pressured to contribute information, even if they had also been told not to conduct outright questioning.

[10] I believe this to have been the case in certain testimony by former Supervisor Green; such is the greater risk when employers hire nonlawyers to coach their supervisors during union organizational campaigns, as Respondent did here.

[11] This qualifying clause is omitted from subsequent quotations of the complaint.

[12] That is, Heath was employed by Respondent at the time of the hearing.

[13] Long quotations of testimony have been electronically reproduced; corrections of punctuation are supplied only where necessary for comprehension.

> about us wearing the buttons and he had asked that we take them off immediately because they weren't part of our uniforms, that he didn't know why we were wearing them and who was passing out the buttons.[14] Also, that he was a little hurt that we were wearing buttons and that there was an open door policy, if we had any problems, we can go talk to him about anything that we had any type of problems about.

Donahue testified that, in January, just before a scheduled employee training meeting, Cicatello telephoned him and reported that some employees were wearing ''union buttons'' (as opposed to Local 115 buttons). Donahue testified that he went into the meeting, but could see no buttons. He testified that he assumed that the buttons were hidden by the winter clothing that the employees had loosened about their persons in an attempt to dissipate heat. According to Donahue:

> So before the meeting started I made a general statement that as far as I'm concerned union buttons are inconsistent with our uniform policy and will not be worn and that was it.

(Donahue testified that it was later that he learned that some union was having meetings, as discussed, infra.)

The date of the event is in issue for two reasons: the Act's 10(b) 6-month limitations date is February 20; and, under *Ideal Electric*,[15] the cutoff date for objections to conduct affecting the results of the August 10 election is the date that the petition was filed, March 22.

Respondent has the burden of proving that violative conduct occurred outside the limitations period of Section 10(b) because this defense to an unfair labor practice allegation is an affirmative one.[16] Consistently, Respondent would have a similar burden to show that otherwise objectionable conduct fell outside the *Ideal Electric* time limitation. I find that Respondent has not met its burdens.

As stated in *Gold Standard Enterprises*, 234 NLRB 618 at 619 (1978), about employees who testify against their current employers:

> The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.[5]

[5] *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co., Inc.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972).

This principle, the more credible demeanor of Heath, and the outrageousness of some other of Donahue's testimony, as discussed, infra, have guided me toward crediting Heath. Moreover, Heath was essentially corroborated in his testimony about the date by a witness called by Respondent, Jeff Tucker. Tucker, a former supervisor, testified that he was a nonsupervisory employee when Donahue told the line technicians that union buttons were not part of the ''uniform code'' and should not be worn. Tucker was asked for his best recollection of when this occurred, and he replied, ''It was probably early spring or late winter.'' By no stretch of the imagination is a Philadelphia January ''late winter,'' much less ''early spring.'' March, however, is both.

I credit Heath's testimony about the date of the event.[17]

Respondent points to other testimony as evidence that any violation by Donahue was effectively repudiated: Donahue testified that, within a few days after he told the employees not to wear the buttons, he was instructed by Gillert that he should not have done so. Donahue testified that he, thereafter, told his subordinate supervisors that, if they saw union buttons, they were not to say anything to the employees. Additionally, Tucker testified that, about a week after he heard Donahue instruct the line technicians not to wear union buttons (generic, not Teamsters), some other supervisors told another meeting of line technicians that they could wear the buttons.

b. *Union button prohibition by Brandt*

Paragraph 15 of the complaint alleges that, in violation of Section 8(a)(1):

> The Respondent, acting through Don Brandt, engaged in the following acts and conduct at the Northeast Avenue facility: (a) In March, 1990, directed an employee to remove a Union button from the employee's uniform. (b) In March, 1990, told employees that they were prohibited from wearing Union buttons.

Former employee Ronald Lawrence testified that during the campaign, at a time that the service technicians were assembling for the workday, he witnessed Brandt instruct employee James Johnson to remove a union button from a cap that Johnson was wearing. Then, according to Lawrence, Brandt instructed the 10 service technicians who were present to go to the building's lunchroom. There, according to Lawrence, ''Don Brandt also came in and spoke to us, as a group, and told us that we weren't allowed to wear union apparel on company time, on company premises.'' After that, Lawrence was asked, and he testified:

> Q. When—when did this occur?
>
> A. This took place—it was—this, again, was prior to the union vote. I believe it was in the springtime, because we were all wearing light jackets, maybe March or April, in that area.

Johnson did not testify; no other service technician testified that he was present in a meeting at which Lawrence discussed union buttons.

Former Supervisor Brandt testified that he first noticed some employees wearing union buttons in the second or third week of January. He testified that he did not instruct the employees to remove the union buttons; rather, he told them that the buttons violated the Company's ''uniform policy'' and asked, apparently rhetorically, if they thought they should nevertheless wear them.

[14] No interrogation is alleged on the basis of this part of the testimony.

[15] 134 NLRB 1275 (1961).

[16] *St. Mary's Infant Home*, 258 NLRB 1025 (1981).

[17] Respondent has no basis for saying on Br. 96, that Richard Gardner's pretrial affidavit states that the employees started wearing union buttons between Thanksgiving and Christmas 1989 and ''shortly thereafter'' Donahue announced the prohibition.

On cross-examination, Brandt was asked if he was sure that the event happened in January. Brandt replied, ''Pretty sure, because it was still cold and most of my—most of the guys that I supervised were wearing their winter coats.''

I believe Brandt's testimony about what he said to the employees. But his timing of the event rested solely on the weight of the coats that the employees were wearing. Heavy coat weather endures well through March in the latitudes of Philadelphia. Moreover, Brandt's conduct was apparently about the same time as Donahue's instruction to the employees; as noted, Tucker placed that conduct at ''probably early spring or late winter.'' For these reasons,[18] I conclude that Respondent has not established that Brandt's instructions occurred outside the limits of Section 10(b) or the period of filing objections.[19]

c. *Promise and grant of the May 28 wage increases*

(1) Contentions and the case-in-chief

Paragraph 7(d) of the complaint alleges that Respondent, by Conner, in violation of Section 8(a)(1):

> On or about May 10, 1990, by letter, promised to grant employees a wage increase in order to discourage them from selecting the Union as their bargaining representative.

Paragraph 19 of the complaint further alleges that, in violation of Section 8(a)(1):

> On or about May 28, 1990, the Respondent: (i) granted employees a wage increase, and (ii) implemented a new review policy accelerating certain employees' eligibility to receive merit pay increases in order to discourage its employees from selecting the Union as their bargaining representative.

The letter, the wage increase, and the change in policy are admitted. The defenses are that Respondent's actions were the result of planning that preceded the known union activity and that its actions were caused by the business necessity of preventing a high employee turnover rate. The General Counsel replies that, even if some wage increase would otherwise have been implemented at the time, the amount of the May 28 increase was so unjustifiably great as to affect the voting in the August 10 election. Respondent introduced a great deal of evidence to explain how the size of the increase was determined.

The March 22 representation petition was being processed when, on May 2, Conner sent a letter to all unit employees. That letter informed the employees of the status of the Board proceedings, and it listed ''two basic reasons why you should vote against UNION representation:''[20]

> FIRST—You do not need the union to ensure good communications and fair resolution of concerns or problems.
>
> SECOND—Union representation here can be financially costly and otherwise detrimental to you.

The May 2 letter continues:

> The union situation has been a shock to us personally. We do care about every staff employee as well as their families. We insist that our Managers [treat] every member of the staff with dignity and respect.

The wage increase in issue here was announced by a May 10 memorandum from Conner to the employees. The memorandum, which is the subject of paragraph 7(d) of the complaint, is entitled ''*UPDATED WAGE/SALARY PROGRAM*'':[21]

> We are pleased to announce that we are proceeding with our previously planned wage/salary adjustments. The adjustments result from an in-depth analysis of the overall wage and salary structure and an assessment of each person's individual standing within that structure. The adjustments will be effective 5/28/90 for all eligible employees.
>
> We should caution you that the union may try to tell you that we are trying to influence the outcome of a possible election. The union may seek to minimize our considerable efforts in updating a wage/salary structure which ensures fair and equitable wages for every employee.
>
> Let us assure you that our sole reason for implementing these wage adjustments is to continue our on-going efforts in providing all members of the Comcast family a decent and fair wage at every position.
>
> We also believe that it is important to provide these adjustments in a timely fashion and have now obtained legal opinions that say we are entitled to proceed in implementing our planned wage/salary adjustments.
>
> Your manager will be meeting with you in the next several days to review your personal wage/salary position. Please feel free to discuss your own individual standing in the overall wage/salary program and have your manager get answers to any questions you may have.
>
> We have had a great tradition here at Comcast. We have worked together to provide the basis for our continued future success.
>
> Thank you for your dedication and efforts on behalf of Comcast.

On May 28, wage increases were granted to unit and nonunit employees in amounts that are indicated below.

(2) Defenses for the wage increases

On May 29, 1989, many of Respondent's unit and nonunit employees received a wage increase. The increases were preceded by a May 1989, meeting conducted by then Comcast Philadelphia Area Vice President Hipple; the employees of both Philadelphia facilities attended. Hipple did not testify; however, Jeff Harris, human resources manager of Respondent's Northeast facility, testified that he attended the meeting.

[18] As discussed below, Lawrence was an unreliable witness, and I would not make a finding based on his testimony alone. This is especially true where Lawrence was so obviously guessing, as his above-quoted testimony about the date indicates.

[19] *St Mary's Infant Home*, supra.

[20] Capitalization is in the original.

[21] Capitalization and emphasis are in the original.

Harris testified that the purpose of the Hipple meeting was to ''roll out the new salary and [sic] administration program'' that was then in the process of being established by Respondent for the Philadelphia and suburban operations (Lower Merion and Willow Grove). According to Harris, Hipple introduced the new program to employees by making a slide presentation; the slides were of a four-page document, the first page of which is entitled ''Comcast—Salary Administration Program.''

The document describes as its ''Purpose'' the establishment of ''fair and consistent practices throughout the Company [and] competitive salary and benefits programs.'' The document states, as the ''Development Process'' of the new program, that job descriptions were being evaluated and updated through use of ''internal'' and ''external'' procedures. The external procedures included reviews of surveys conducted by Cable Television Administration and Market Society (CTAM), a service that collects information about wages and salaries from cable industry employers in the United States and provides such information to subscribers.

The document used by Hipple states that each employee would be eligible for reviews which may, or may not, result in increases within ranges established by the surveys. The document, copies of which were furnished to the employees describes as ''Ongoing Administration'' of the new salary program:

> A. At least annually, an evaluation of the salary program will be conducted to ensure internal fairness and external competitiveness as well as to consider economic conditions inside and outside the Company.
>
> B. If appropriate, ranges will be adjusted in consideration of these factors and will be announced when effective.

Using the classifications of service technicians, installers, line technicians, and (nonunit) customer service representatives, the document concludes with a comparison of the employees' wages with the wages at the other Philadelphia cable system (Company A), and it compared their wages with the wages called for by a CTAM survey. The wage comparison presented to the employees was:

		Minimum	*Average*	*Maximum*
Customer Service Rep.	Company A	(Sometimes hired @ $5.50)		
	CTAM	5.35	$6.45	$7.55
	Comcast	6.40	7.65	8.90
Installer	Company A	(Most hired @ $6.00 Avg. Actual $6.50)		
	CTAM	6.23	7.48	8.75
	Comcast	6.40	7.65	8.90
Service Technician	Company A	(Average $7.50 to $8.00)		
	CTAM	7.00	8.40	9.80
	Comcast	7.00	8.40	9.80
Line Technician	Company A	(Average $9.00 to $10.00)		
	CTAM	8.35	10.01	11.30
	Comcast	9.00	10.65	12.00

Harris further testified that during his presentation, Hipple said words that would have given the employees the impression that, when the new program was implemented, each employee would get at least a 5-percent increase. However, it is undisputed that, on May 29, 1989, some employees (unit and nonunit) received a 5-percent wage increase, and some employees received more; but many employees received a lower percentage; and some employees received no increase.

Doyle testified that when Hipple left in mid-August 1989 and he assumed the position of acting Comcast Philadelphia area vice president:

> The first [thing that I noticed] was that Mr. Hipple, during the wage and salary presentation, had evidently made a promise in his presentation that all employees could expect a minimum of a five percent increase off of what they made at that time.
>
> The second thing was that it was very apparent to me that this program had not been successful, that people were very discontent, not only with the five percent issue, but they were discontent with wages.
>
> And the third thing was that the turnover in the place just was overwhelming. It was very difficult to hire people, and there was a high turnover rate, a very high turnover rate, and that turnover rate was 50% of the employees were turning over each year. Two-thirds of that turnover was voluntary. And 50% of the turnover that existed was happening to employees who had less than one year experience with the company.
>
> And these three things were just very evident.

Further according to Doyle, after noticing these three things:

> I came back and spoke with [Senior Corporate Vice President for Human Resources] Paul Gillert immediately. I said to Paul that . . . we need to immediately address what I call the five percent issue.
>
> It was obvious to me that employees felt that they had been lied to, that a person who was the area Vice-President of the company [Hipple] had promised something to people, and when the wage and salary program was rolled out, that promise didn't come true. And I said to Paul, we have to deal with this now.

> The second thing I said to Paul was that we needed a new wage and salary survey to be done in Philadelphia. I communicated with him the discontent among the employees with the wages.
>
> And the third thing I communicated with Paul at that time was just this whole hiring problem and the turnover problem, that somewhere in this wage and salary program, we had to address that issue.

Doyle testified that Gillert agreed that the 5-percent problem had to be rectified immediately. Doyle further told Gillert to talk with Peggy Friday, director of Comcast's human resource information systems department, and instruct Friday to start an overall review of the Philadelphia wage structure.

Doyle further testified that, at some point in September 1989 he also spoke directly to Friday and:

> I said to her that . . . we were having a lot of problems hiring people, we were having problems retaining people, and there was employee discontent with the program that had been presented in May of 1989. . . . I asked her to proceed with the program and conduct the wage and salary survey for Philadelphia.

In October 1989, the employees who did not get at least a 5-percent wage increase in May did so then.

Doyle testified that he, Gillert, and Friday met immediately after Friday submitted a written December 6 recommendation for wage increases for Philadelphia and suburban employees. Doyle testified:

> Well, Peggy made a presentation that broadly explained what she did and expressed that she had changed the salary guidelines by four percent. I looked at it and . . . I said to Peggy Friday and Paul Gillert . . . that this did not address the turnover for us and especially did not address the turnover that we were experiencing during the first year. . . .
>
> [Friday and Gillert] told me about something they had tried or implemented in California and it was basically a process where an employee in their first year on the job received a six month review and that they had heard that this had worked well in California because evidently the California systems were having a real turnover problem, too. . . . I said I thought it was a good idea, that we should do whatever we could to stem the turnover and we should go ahead and implement it or go ahead and figure out the calculation.

Doyle further testified:

> [Friday] went back and prepared something else and in January 1 received a document, another document from her. . . . [I]t was just another wage and salary document and evidently had some calculations figured in on the six month scenario, but other than that it was basically the same document as this with some worksheets behind it.

As thusly modified, Doyle testified, Friday's December recommendation is what was implemented by Respondent on May 28, 1990. Respondent relies on this testimony for its argument that the May 28 increases were determined by December 6, before supervisory knowledge of Teamsters union activity.

Friday's January recommendation was not placed in evidence during Doyle's testimony; it was placed in evidence by Respondent during Friday's testimony, as will be discussed below. The recommendation is undated, and the testimonies of Doyle and Friday are vague about when it was submitted.

At the time of these events, and at time of trial, Respondent employed an individual by the name of Al Calhoun. Although he was mentioned several times during trial, Calhoun did not testify. No document reflects what Calhoun's position was.[22] Gillert testified that Calhoun was ''director of operations''; Davis testified that Calhoun was ''general manager''; Donahue testified that Calhoun was ''director'' of ''customer service or the nontechnical side of the company''; Cicatello testified that Calhoun was ''a systems manager.'' Whatever his precise position, Gillert testified that Calhoun reported directly to Doyle. (Doyle was not asked what position Calhoun held.)

By memorandum dated January 17, 1990, Doyle sent a copy of Friday's January recommendation to Calhoun; in a covering memorandum, Doyle stated:

> Peggy Friday has worked up a new wage scale for Philadelphia. There are some modifications to the existing wage scale. Why don't you and Delores [Muldrew, a director in Comcast's human resources department] go over it so we can address this in the future?

The memorandum shows that it bore an attachment; presumably, the attachment was Friday's January recommendation. Therefore, the earliest established date for Friday's second written recommendation is January 17.

Doyle testified that, when Calhoun received the January 17 memorandum, Calhoun asked Doyle for permission to ask Friday to create a similar recommendation for Respondent's FLSA-exempt employees. Doyle agreed.

Respondent placed in evidence a February 8 memorandum from Calhoun to Friday; it asks for a review of Respondent's pay scales for FLSA-exempt employees; it prefaces the request by stating:

> Recently, I received a copy of your recommendations for 1990 wage scale[s] for our non-exempt employees; however, we have not reviewed our wage scales for exempt employees since 1987 or early 1988. After a quick review of some of your recommendations for our non-exempt employees, if implemented, they would cause some serious compression problems relative to the salaries being paid to the supervisors.

Friday testified that she performed this additional survey; it was completed in early March and she then submitted them to Calhoun and Doyle; then, on March 22, her recommendations for both exempt and nonexempt employees were considered in a meeting.

Doyle, Gillert, Donahue, and Friday testified that on March 22, the day that the representation petition in Case 4–RC–17321 was filed by the Union, Doyle, Friday, Gillert,

[22] Calhoun was not named in the complaint as a supervisor or agent.

Donahue, and Calhoun met to discuss Friday's recommendations. According to Doyle:

> The meeting started and it couldn't have been going more than 15 or 20 minutes when someone came into the room to get Paul Gillert and indicated that evidently some information was either received or, I don't know how the information was received, but there was something involving a petition that had been filed.

Doyle testified that whoever gave the report to those at the March 22 meeting did not know which employees of Respondent were the subject of the petition. Gillert left the room and soon reported back that the Teamsters petition was for representation of the Philadelphia employees. Doyle asked Gillert if that fact did not prevent implementation of any wage changes in Philadelphia. Gillert, a lawyer, said that he would confer with outside counsel on the matter. Gillert and Friday testified in accord with Doyle about the announcement of the petition during the May 22 meeting.

According to Doyle, after Gillert conferred with outside counsel, Gillert advised Doyle that failure to grant the wage increases ''would be a violation of the law.''

At the conclusion of his direct examination, Doyle was asked, and he testified:

> Q. At any time until you were interrupted in the late March meeting with notice of the union petition, had you discussed the wage increase in the context of the union at all?
>
> A. The only discussion that I had regarding the union at all was a meeting that I had, would have been a meeting that I had with Paul Gillert which would have been in January, around that time, and that was only when we started some time in January, we started to hear about a meeting that was held somewhere in Philadelphia and I advised Paul Gillert about that particular meeting and then Paul and I between January and March would basically pass each other in the hall and I would just tell him that all I'm hearing is good, that the meetings are very poorly attended, that the flyers are not going over well, that employees are not taking them seriously, so that would have been the context that, you know, we would have talked about it.
>
> Q. Did, prior to March 22 or the end of March of 1990 in that meeting where you found out the petition was final, did Mr. Gillert raise with you any issue relating to the wage increase and link it to the union?
>
> A. No.

Respondent cites this testimony as a denial by Doyle that he had any knowledge of the Teamsters organizational effort before January.

Gillert testified that, ''in either very late December, early January'':

> I received a call from Al Calhoun, and Al was the director of operations, and he had mentioned that he had understood there may have been a meeting, et cetera, at a union hall. He didn't even know what union was involved, but that there was a very small participation and he didn't think it was anything serious at that stage.

Area Director of Engineering Donahue testified that, at some time in January, an employee told him that some union had conducted a meeting of Respondent's employees. He drove to where the employee said that the meeting had been conducted, and saw that there was a sign on the building that included a reference to ''International Brotherhood of Chauffeurs and Warehousemen,'' but he remained ''confused'' and did not know what union that was at the time. Donahue testified that he reported his findings to Calhoun.

The Union placed in evidence a photograph of its Philadelphia hall; the photograph was taken from across the street. Easily discernable on the building's marquee are the freestanding letters and numbers: ''LOCAL 115.'' Above the letters and numbers, on the building, is a large Teamsters' emblem which includes a depiction of the heads of two draft horses.

Other supervisors also testified that they had no knowledge of the Teamsters activities until January or later.

On cross-examination Doyle testified that, when he talked to Gillert in August 1989 and ordered a wage review, he mentioned only installers and customer service representatives as the only employees that Respondent was experiencing difficulty in hiring and keeping employees. Doyle further testified that, before the March 22 meeting was interrupted by notice that a petition had been filed, the only nonexempt position that was discussed was the (nonunit) position of customer service representative. Doyle and Friday testified that there was no disagreement with Friday's recommendations that she made at the March 22 meeting.

Friday testified that in making her wage-range recommendations for the 1989 and 1990 increases, she consulted the independent source mentioned in Hipple's presentation in May 1989, CTAM; she also consulted another survey and contacted other employers.

Friday testified that CTAM surveys establish ''market rates'' or norms, for ''benchmark'' jobs in the cable industry. In the industry, wages are typically set at 85 percent of market rates as minimums for each benchmark job, and 120 percent as maximums. Respondent followed this standard in determining the 1989 wage increase, using a 1988 CTAM survey.

Friday's December 6, 1989 memorandum to Doyle states that she is recommending that minimums be set at 87.5 percent, and maximums be set at 125 percent, of the CTAM market values for each job classification. On direct examination, Friday testified to the same effect. However, on cross-examination, Friday acknowledged that what she reported as the CTAM market values was the 1988 CTAM market values augmented by 8 percent; 5 percent of that was added because Philadelphia is a high wage-rate area, and 3 percent was for the ''passage of time.''

Friday testified that she discussed these recommendations with Doyle and Gillert in a mid-December 1989 meeting and a January 1990 meeting. Friday was asked, and she testified:

> Q. Subsequent to giving this recommendation to Mr. Doyle, what happened?
>
> A. I would say sometime mid-December, prior to Christmas, Mike Doyle, and Paul Gillert, and myself had a meeting to go over these recommendations.
>
> Q. What happened at that meeting?

A. We discussed the survey data that I had cited here. I discussed with them that in addition to the benchmark jobs that I've cited in this document that we needed to take a look at the movement in the market for the other jobs within the salary structure, and discuss the fact that probably, based on the passage of time, the 1989 wage structure would need to adjusted by four to five percent, based on the passage of time.

We also discussed a problem that Mike felt he was having in the Philadelphia, Willow Grove, and Lower Merion systems, in that newly hired employees—we were having very heavy turnover, installer, customer service, and our entry level positions. We discussed the fact that problem had existed in our six western systems, and in my work with them we had—they had told me that in order to help alleviate this problem they had instituted two six-month merit increases prior to going to the annual merit increase, which we had in most of our systems. So, I suggested that perhaps we should institute that in the Philadelphia area, see if that would help alleviate this heavy turnover problem. . . .

Q. Did the [December] meeting end with any decisions?

A. Yes. Basically, at the close of that meeting I was instructed to prepare details for a revised salary—a revised wage structure for Willow Grove, Philadelphia, and Lower Merion. . . .

Q. Were you given any instructions regarding this California thing that you had talked about?

A. I was [not] really given any instructions, other than the parameters that we would institute two six-month increases for new employees, and then move them onto the annual increase.

. . . .

Q. Did that detail [of your January recommendation] have any differences in it from—well, why don't you describe what differences there were, if any, between what you had recommended and what was contained in that detail.

A. There were no differences, but what we discussed in that mid-December meeting was, in fact, what I put together for the detail in—that I submitted to him sometime in January.

Q. That detail would have included adjustment of the merit increase, adding the six months?

A. That would not have been built into the structure. That six-month—the two six-month merit increases would have been built into the formula for giving wage adjustments under the revised structure.

Q. You said that you had told Mr. Doyle and Mr. Gillert that it looked like a four to five percent adjustment to the structure would be required. Did the structure—when you did the [January] detail did it turn out that the structure had [an increase]?

. . . .

A. Yes. Four percent, we adjusted it. The wage structure for '90 was four percent greater—the market rates were four percent greater than they were in '89.

That is, although Doyle testified that Friday told him in December 1989 that her December 6, 1989 recommendation included a general 4-percent wage increase, Friday testified that her 4-percent recommendation was made orally in the mid-December meeting as an addition to her December 6 written recommendation; and in the December meeting she was instructed to prepare the ''details'' of that recommendation, which is what she submitted in January 1990. The documents bear out Friday; her written January recommendations are 4 percent above the December recommendations. The documentary evidence also supports Friday's testimony that her January recommendations did not include, expressly, the ''California solution'' (or wage adjustments after the first 6 months).

Friday testified that no mention of a union organizational attempt was made in the above processes of determining the 1990 wage increases that are the subject of the complaint. Friday further testified on cross-examination that wage adjustments are not automatic; she must be requested each year to make adjustments by the regional vice president, even though the Hipple presentation stated that the reviews, including reviews of CTAM statistics, would be conducted annually.

On cross-examination of Friday, it was demonstrated that her January recommendations, in addition to the 4-percent general wage increase, called for upgrades in classifications in addition to those upgrades that she recommended in December.

During Friday's direct examination, Respondent introduced its exhibit 63, a summary exhibit that reflects the impact of the 1990 wage increases compared with the 1989 increases, and it reflects the constituents of the 1990 increases, all on an average-per-classification basis. I have used the exhibit to produce the following chart. The constituents of the 1990 increases are grouped in headings that indicate, respectively: (1) the 4-percent increase that Friday recommended ''based on the passage of time'' for all classifications; (2) the increase from 85 to 87.5 percent for the minimums, and an increase from 125 to 127 percent for the maximums, of the 1988 CTAM survey for benchmark jobs (with augmentation of the CTAM standards by 8 percent for ''passage of time'' and the Philadelphia area wage differential); (3) the ''California plan'' of giving reviews to new employees within 6 months of employment rather than 1 year, as Friday and Gillert recommended; (4) the upgrades of certain classifications that Friday recommended, either in December 1989 or January 1990; and (5) the supervisors' direct input that was based on employee merit.

For the most populous unit classifications, the exhibit reveals:

Job Title	*1989 No. of Ees.*	*1989 Avg. Incr.*	*1990 No. of Ees.*	*1990 Avg. Incr.*	*Constituents of 1990 Increases*				
					4% Factor	*87.5% Factor*	*New Ees. %*	*Upgrade %*	*Merit %*
Converter Prep Tec.	6	5.1	8	5.6	0.6	1.1	1.0	0.0	2.9
Installer	15	5.0	21	9.1	4.6	3.2	1.4	0.0	0.1
Service Technician	25	5.1	28	15.5	3.8	2.0	1.3	8.4	0.0
Construction Technician	6	5.1	6	14.8	1.9	3.0	1.2	8.7	0.0
Line Technician	10	5.0	12	11.6	1.0	1.9	1.5	7.2	0.0

For the most populous nonunit positions, the exhibit reveals:

Job Title	*1989 No. of Ees.*	*1989 Avg. Incr.*	*1990 No. of Ees.*	*1990 Avg. Incr.*	*Constituents of 1990 Increases*				
					4% Factor	*87.5% Factor*	*New Ees. %*	*Upgrade %*	*Merit %*
Customer Service Rep.	54	6.6	53	8.8	4.0	2.9	2.0	0.0	-0.1
Dispatcher	15	5.0	14	7.0	3.1	2.5	1.4	0.0	0.0
Clerk	10	9.7	8	3.7	1.0	1.5	1.2	0.0	0.0

The 1989 increases indicated on both tables represent a total of the May raises plus the October supplements (that were awarded after Hipple's representation that everyone would get, at least, a 5-percent wage increase that year). Respondent's Exhibit 63, on which the tables are based, also reflects that there were 187 unit and nonunit Philadelphia employees in 1989, and there were 199 in 1990.

No single exhibit compares what the unit employees received in 1990 against the increases they received in 1989, except Respondent's Exhibit 63 which lumps unit and nonunit employees together. However, a comparison of Respondent's Exhibit 63, General Counsel's Exhibit 2 (the names of the unit employees as of March 22, 1990), and the unit description demonstrates that, of the 92 employees in the unit in 1990, 2 (the 2 warehousepersons) had received 5.6-percent wage increases 1989, the remainder of the unit employees received 5.1 or 5.0 percent in 1989.

Friday testified that, to compute the 1989 wage increases that were given pursuant to the program that was established that year:

> I also utilized other published surveys for administrative and other cable-specific positions, gathered that data, checked it against what the existing structure was, and the recommendations to increase the structure by an average of approximately 14 percent.

Respondent's Exhibit 63 also reflects that the 1989 wage adjustments for all Philadelphia employees (unit and nonunit) averaged 6.10 percent; for 1990, the average for all Philadelphia employees was 8.2 percent. However, the 6.1-percent average for all employees in 1989 was the obvious result of larger wage increases to the nonunit employees; of those approximately 90 employees, 18 received increases that were greater than 9 percent,[23] and only 31 received increases of less than 6 percent.[24] (Respondent does not contend that any portion of the 1990 wage increases to the unit employees represented some sort of ''catch-up'' with the nonunit employees.)

On cross-examination, Friday acknowledged that when wage and salary programs such as Respondent's are introduced, the first years usually bring greater wage increases that following years.

Respondent also introduced documents reflecting that, in 1990, of its 44 employees in Lower Merion and Willow Grove, the 2 installers received wage increases of 4.8 percent, the 10 service technicians received 15.7 percent, and the 1 construction technician received a 13.8-percent wage increase. Similar raises were given to employees at Comcast's Atlantic-Pacific region's Meadowlands and Trenton, New Jersey, operations.

As noted, the primary defense to the allegations of paragraphs 7(d) and 19 of the complaint is that Respondent had no knowledge of the subject Teamsters activities until after Doyle ordered the May 28 wage increases. In the presentation of the prima facie case, the General Counsel offered evidence of a speech by Doyle that would tend to indicate specific knowledge of the Teamsters activity as early as late September or October 1989; I have considered this evidence, but I find that Doyle credibly denied the testimony upon which the General Counsel relies.

However, in rebuttal, the Charging Party introduced other evidence: On November 13, 1989, the Union sent letters to 72 of the unit employees who had signed authorization cards by that date; and the letters thank the employees for signing authorization cards and invite them to a meeting at the Union's hall in Philadelphia on November 16. Alleged discriminatee Eric Funchness testified that within a day or two of his receipt of this letter, while he was working at the

[23] In this category I include the: 1 receptionist; 10 specialized clerks; 4 production assistants; 1 playback operator; 1 cashier; and the 1 production editor.

[24] I include the 9 general clerks (who received increases of 5.5 percent); 10 dispatchers (5.1 percent); 2 payroll coordinators (5.0 percent); 2 secretaries (5.1 percent); 1 accounting assistant (5.1 percent); 3 executive secretaries (5.0 percent); 1 human resources assistant (5.0 percent); and the 3 field inspectors (5.0 percent).

Northeast facility, his then supervisor (either Jeff Hopkins or Paul Rawls, Funchness could not remember which) handed him a copy of the following memorandum which is printed on Comcast' usual form for memoranda:

> To: All Employees Date: November 15, 1989
> From: Al Calhoun To: [Blank space]
> Copies
>
> Recently some employees have received correspondence from the local Teamsters Union. This correspondence was mailed directly to their homes.
>
> We want to assure all employees that Comcast did not violate your privacy and did not release confidential information to any organization. We regard employee's [sic] addresses as highly confidential and personal.
>
> We take this matter very seriously and we are attempting to determine how the confidential information was obtained by the Teamsters.
>
> AC/kn

The memorandum is neither initialed nor signed.

In surrebuttal of this evidence that Respondent had knowledge of the Teamsters activity at least by November 15, 1989, Respondent called Gillert and Labor Consultant Al Peddrick (whom it hired for the Teamsters campaign); they testified that Calhoun issued a similar memorandum in April 1990 but they knew of no such memorandum that Calhoun issued earlier. Gillert further testified that Calhoun usually initialed or signed his memoranda. Gillert also testified that Respondent employed no clerical with the initials ''kn'' in 1989.

This testimony by Gillert and Peddrick would have been some corroboration for denials by Calhoun, if Calhoun had been called to deny authorship and distribution of the quoted memorandum. However, even though Calhoun was still employed by Comcast at time of trial, Respondent did not call Calhoun to testify, and it offers no reason for not doing so. Nor did Respondent call any supervisor at the Northeast facility (Rawls or Hopkins, or anyone else) to deny that, in November 1989, the Calhoun memorandum was distributed as Funchness described.

The nonproduction of Calhoun bears multiple aspects of significance: (1) Calhoun was the putative author of the November 15, 1989 memorandum; (2) Calhoun was the first person to whom Donahue reported knowledge of activity by ''International Brotherhood of Chauffeurs and Warehousemen,'' and he was the person from whom Doyle and Gillert got their first knowledge of the Teamsters activity. As the clearinghouse for Respondent's information, the timing of Calhoun's first knowledge would have been critical, even without the November 15, 1989 memorandum; and (3) Calhoun's request to Friday to do a survey of the wages of the FLSA exempt employees' wages caused, at least in part, the delay in the final decision on all wages; there is no other logical construction to Friday's testimony that her survey of the unit employees' wages were completed in February, but the final review of her January recommendations was not conducted until the management meeting of March 22 (the same day the petition was filed).

Respondent assuredly recognized the importance of producing Calhoun; at trial, it requested a continuance to present him. The continuance was granted, but then, after several days, Respondent withdrew the request.

I draw the strongest adverse inference against Respondent for its failure to present Calhoun; I discredit the testimony of Doyle that he knew nothing of the Teamsters activity until January (to the extent the above-quoted testimony of Doyle can be said to constitute such a denial, a problematical proposition). I do not believe that Calhoun would have failed to share his knowledge with his immediate superior, Doyle.

Moreover, I believe that Calhoun would have shared his November 1989 intelligence with Doyle immediately. The Union placed in evidence a management policy manual which requires that:

> The . . . members of supervision are to notify Headquarters Human Resources *and* the Regional Director of Human Resources/Regional Vice-President[25] immediately whenever there is *any* evidence or suspicion of union activity. The notice should be first by telephone, and followed immediately by a confirming memo.[26]

At another point, the manual demands:

> The manager should submit as much of the following information as possible. Some information is better than none. Additional information should be supplied as determined. Under no circumstances is the manager to delay notification due to the gathering or collection of further information or for administrative reasons, such as a lack of secretarial assistance. At this stage, speed and brevity are more important than typographical accuracy or completeness. The information should be in the following sequence:

Then follows a list of things to be reported, the first of which is ''*Identification*—of union or unions involved.''

These passages of Respondent's management manual render absolutely incredible Doyle's quoted testimony that his initial discussions of the Teamsters activities amounted to little more than passing remarks in the hallway.

Although Funchness has a positional bias,[27] he appeared credible in his testimony about his receipt of the Calhoun memorandum; I credit that testimony; and I discredit the testimony of Doyle, Gillert, and Donahue, that they had no knowledge of the Teamsters activity until late December 1989 or January 1990.

(Respondent's policy manual clearly states that identification of any union involved is a matter of the first order. This factor fortifies my conclusion that Donahue gave consciously false testimony when he testified that he went to the Union's hall in Philadelphia, and saw ''International Brotherhood of Chauffeurs and Warehousemen'' (and, presumably, the draft horses' heads) but still did not know which union was involved. This testimony was obviously tailored to fit Respondent's defense that there was always ''general'' talk of unionism about, but there was no knowledge of the Teamsters 1989–1990 organizational effort until after the May 28 wage increases had been planned. Moreover, I believe that

[25] These would have been Gillert and Doyle, respectively.

[26] Emphasis in original.

[27] As well as being an alleged discriminatee, Funchness also assisted the Union in the organizational attempt, and he was the General Counsel's assisting witness at trial.

Donahue did go to the Union's hall after some employee's report, but it was not in January 1990; it was in November (or possibly earlier) 1989—before Donahue knew that Calhoun had independently identified the Teamsters as the Union involved and before Calhoun had issued his November 15, 1989 memorandum.)

Respondent adduced no evidence in support of the contention that there was turnover which prompted, in part, the May 28 wage increases.

d. *Conner's promise of a work boot benefit*

Paragraph 7(b) of the complaint alleges that Respondent, by Conner, in violation of Section 8(a)(1):

> In June 1990, in a meeting, promised its employees a better work boot benefit in order to discourage them from selecting the Union as their bargaining representative.

Alleged discriminatee Richard Gardner testified that in a meeting at the Wayne Avenue facility:

> Okay, that was approximately the summer of 1990, possibly June or July, I'm not really sure, but one thing I remember from this meeting was Ty Conner was telling us they wanted to implement a work boot policy for us but that it was—he couldn't do anything about it because[,] pending the union election, they didn't want to, you know, they didn't want to do that. They felt that might be breaking the law or what not.

Gardner testified that previous to this meeting the construction department employees had a ''gripe'' that they were required to wear safety work boots, but they were expensive, and they were receiving no assistance from Respondent in their purchases.

Conner testified that he held a series of meetings with the employees after he was hired April. He testified:

> Again, in one of these meetings the comment was made that as far as they were concerned, certain employees were concerned, it was a requirement to work in the field, and that it was their belief that it was a part of the uniform, and that, therefore, there should be at least a stipend of some sort, provided with regard to the subject of work boots. . . . [T]he first time it was raised I merely pointed out that I didn't know what the history was of that, and I would be more than willing to look into it and see what I could find out.

Conner testified that he did report back to the employees to answer to many questions that they raised about benefits. He testified that his responses then were along the lines of ''we were not in the position to make any changes at that point in time.'' When specifically asked if he could remember what he said when he returned with an answer to the work boot questions, Conner replied, ''Not about work boots in particular.''

Taking the two testimonies together, it appears, and I find, that Conner's statement to which Gardner testified was made when Conner was getting back to the employees on the question of work boots. Conner's testimony that he gave standardized responses when he returned to the employees, but he could not remember the one in issue here, was less than a clear, or convincing, denial. I credit Gardner.[28]

e. *Interrogation of Lawrence by Cicatello*

Paragraph 9(c) of the complaint alleges that Respondent, by Cicatello, in violation of Section 8(a)(1): ''In July 1990, interrogated an employee about the employee's Union sympathies.'' Former employee Ronald Lawrence testified that about a month before the August 10 election:

> Yes, sev—well, several times I was spoken to, but I—I remember certain occasions where Randy Cicatello questioned me on Comcast premises, in the hallway, or outside the, you know, in the parking lot asking me my opinion about the union, and, of course, I kept I—I kept it low key. I didn't offer my opinion.

Cicatello denied ever speaking with Lawrence about the Union, and he specifically denied asking Lawrence about his opinions.

Lawrence is a former employee, and former employees usually have no reason to give false testimony. However, Lawrence had been discharged for dishonesty by the time he testified, and I am suspect of his testimony that Cicatello interrogated him ''several times,'' or at all. Certainly, no other employee testified that he was interrogated by Cicatello, and there is no reason that Cicatello would have singled out Lawrence for repeated, or even one, interrogation.

I credit Cicatello, and I shall recommend dismissal of the allegation on the basis of this credibility resolution.

f. *Interrogation of Stevenson by Green*

Paragraph 10(a) of the complaint alleges that Respondent, by Green, in violation of Section 8(a)(1): ''In July 1990, interrogated an employee concerning the employee's Union sympathies.''

Alleged discriminatee Marshall Stevenson testified that in July, as he and other employees were returning to the Wayne Avenue facility at the end of the day:

> And [Green] asked me, you know, how did I feel, you know, which way I wanted to vote for the union, why did I feel as though I needed the union, that's what she asked me. And it was in the presence of several employees, because we all came in, we all walked past the timeclock [sic] together, you know, and she had asked me about that.

Stevenson testified that he replied to Green that he thought it was ''in my best interest for me to have a union and it was my decision to have a union. And she pretty much backed off.''

On cross-examination, Stevenson testified that he was wearing a union button at the time and that Green asked the question after she noticed it.

Stevenson could not identify the other employees who were present in the area; however, Richard Gardner testified that he was in a hallway at the building in June when ''I heard Lynn Green ask an employee by the name of Marshall

[28] Respondent did introduce a work boot benefit after the election, but that action is not alleged as a violation.

Stevenson why he felt that he needed a union to represent him.'' Gardner testified that he heard nothing else at the time.

Green was called as a witness by the General Counsel. She was not asked about this alleged incident; however, on cross-examination, she was asked if she had interrogated any employee in July 1990; Green replied, ''Not that I recall.''

This was less than a denial by Green.[29] I credit Stevenson (and Gardner, whether Gardner was referring to the same exchange or not).

g. *Futility threat to Sweeney by Cicatello*

Paragraph 9(b) of the complaint alleges that Respondent, by Cicatello, in violation of Section 8(a)(1):

> In July 1990, by telling an employee that the Respondent would not negotiate or deal with the Union and that the employees would be forced to strike, indicated to employees that it would be futile for them to select the Union as their bargaining representative.

Current employee Michael Sweeney, a lead service technician, testified that at some point after the July 13 direction of August 10 election, but before that election:

> You know, they was—[Cicatello] was talking, in general, like if—if—if the union gets in, there'll most likely be a strike. . . . That's, you know, that the union, if—if they got it—if we wanted to vote, that we would have—probably go on strike that day. You know, they wouldn't give in. That's what he was talking about, in general.

When asked who ''they'' was, Sweeney replied: ''I assume the company. That's what he was talking about.''

Cicatello denied any such remarks. Sweeney was clearly a reluctant witness, and perhaps something was said that should have been the subject of the complaint. However, Sweeney's sketchy testimony requires too many assumptions on which to make the finding of fact that the General Counsel requests, and I do not.

On the basis of this credibility resolution, I shall recommend dismissal of this allegation of the complaint.

h. *Interrogation of, and promotion promises to, Heath by Conner and Cicatello*

Paragraph 7(a) of the complaint alleges that Respondent, by Conner, in violation of Section 8(a)(1):

> In early to mid-July 1990, at the Wayne Avenue facility; (i) interrogated an employee about the employee's Union sympathies and (ii) made an implied promise of promotion to the employee in order to discourage the employee from engaging in Union activities.

Paragraph 9(a) further alleges that Respondent, by Cicatello, in violation of Section 8(a)(1):

> In the first week of July, 1990, made an implied promise of promotion to an employee in order to discourage the employee from supporting the Union.

Current employee Heath testified that during the summer of 1990, after a monthly departmental meeting:

> [Conner] had asked me how I was doing, and I told him, you know, how I was doing and all that.
>
> And then he asked me how I felt about the union. And I told him flat out that we needed protection due to the some of the things that were happening inside the company with management and some of the way things, people were being treated there.
>
> He said that he didn't think that it was necessary, that some training was coming forth for the management. And then the weird thing about it, then he asked me about a job opening that came up in Lower Merion, there is a lead line technician slot that was opening, and asked me why I hadn't applied for that. And I told him flat out that the manager that was prior at Wayne Avenue had went there and I had problems with him and that I didn't feel that it was my best interest to go to Lower Merion.
>
> And, you know, he said he can understand that . . . .

Conner testified that after the meeting Heath approached him and complained, inter alia, about his wages, especially as compared to the wages received by his wife who worked for the telephone company. It was at that point that Conner mentioned the opening of a lead position in Lower Merion. Conner denied that the Union was mentioned in the exchange. On cross-examination, Conner testified that he could not remember if Heath said that he did not wish to transfer to Lower Merion because he had previous problems with the current manager there.

Conner further testified that, after talking to Heath, he approached Cicatello, ''and I said, 'Randy, do me a favor, just follow-up and see if there is any interest there,' and that was the end of it.''

Heath testified that, after his exchange with Conner:

> [Cicatello] called me to the conference room, which is like in the front part of the building on the Wayne Avenue side, and he was asking, it was almost like a career development answer type of situation. Where was I headed?
>
> And it was puzzling, because I had never had any words with Randy prior to him being our plant manager and asking regular questions on asking me how my career was going to go. And he asked me the same thing about the Lower Merion slot, and I said no, I wasn't going to apply for it because at that time Jeff Hopkins, he used to be our supervisor, was still there. And he mentioned that, you know, that could be worked out, that it was really no problem, that I should apply for it to help me to improve myself to probably future other employment in Comcast like in management or something like that. I said I didn't want to go down there at all.

[29] Compare Green's firm denial that she foisted ''Vote No'' buttons on employees, infra.

Cicatello was asked on direct examination:

> Q. And can you relate the circumstances of that conversation, please?
>
> A. It was my understanding that Herman Heath was interested in a supervisory position in Lower Merion.
>
> Q. How did you get that understanding?
>
> A. From Ty Conner.
>
> Q. Did you initiate the conversation with Mr. Heath?
>
> A. Yes, I did.
>
> Q. And as best as you can recall, what did you say to him?
>
> A. Basically what the job was all about.

One thing that is absolutely clear is that Heath did not wish to go to Lower Merion, for a promotion or otherwise. He would not have told Conner that he was interested in going there, Conner did not testify that he told Cicatello that Heath was interested in going there, and Cicatello's testimony that he acted on such an ''understanding'' that he got from Conner was necessarily false.

I further found Heath credible in his account of his exchange with Conner, and I credit Heath's testimony over Cicatello's and Conner's.

i. *Interrogation of Bennett by Rawls*

Paragraph 8(a) of the complaint alleges that Respondent, by Rawls, in violation of Section 8(a)(1): ''In early to mid-July 1990, interrogated an employee concerning the employee's Union sympathies.''

Alleged discriminatee Lynetta Bennett testified that in July, at her work station:

> Well, [Rawls and I] were talking about work because I had brought to his attention something that I was doing at my work station, and, you know, the conversation, just in mentioning, he happened to mention, you know, to me how, asked me how I was going to vote in the upcoming election. And I don't remember replying to him.

Rawls denied asking Bennett how she was going to vote; however, I found Bennett credible in her testimony, and I do credit it.

Moreover, Bennett testified that she wore a union button ''from time to time.'' There is no evidence that she was wearing one at the time Rawls so questioned her.

If an employee wears union insignia on one day, and not on others, some supervisors' curiosities will be peaked; they will wonder if the employee has changed sides. Again,[30] such curiosity will increase to the point of becoming institutionalized where the supervisors' employer is keeping running scores, as Respondent was doing in the Peddrick meetings.

This reasoning fortifies my conclusion that Rawls did question Bennett, as Bennett described.

j. *Interrogations of Stevenson by Conner*

Paragraphs 7(e) and (f) of the complaint allege that Respondent, by Conner, in violation of Section 8(a)(1):

> In mid to late July, 1990, [and early August, 1990] . . . at the Wayne Avenue facility, interrogated an employee concerning the employee's Union sympathies.

Alleged discriminatee Marshall Stevenson testified on direct examination that approximately 2 weeks before the August 10 election a meeting was held at the facility; in the meeting ''Vote No'' and ''Vote for Ty'' buttons were distributed out by supervisors. After the meeting, in a hallway:

> Ty Conner had asked me why wasn't I wearing one of the buttons. I told him I didn't feel, you know, I didn't feel that way, and I wanted to wear the button, you know, that I wanted to wear.
>
> He then agreed with me that, you know, I should wear the button which I, you know, I want to, you know, support.

Further in support of this allegation, Stevenson testified that, within a week before the election, at a timeclock:

> [Conner] pulled me to the side before I punched in at the time clocks, and he said to me that he had heard a report and he didn't believe it was true, but he had heard a report that I was strong-arming people to have them vote for the Local. And he said that someone had came to him and said this. I asked him who was it, and, you know, and I didn't, it's not true, why can't we have a meeting with the person who said that happened, you know, said that to him.
>
> And he said, well, you know, I didn't really believe it, but I need to play fair, because he is playing fair and I needed to play fair. And I was never told who said it or whatever, and then it went from there.

Conner denied, credibly, ever asking Stevenson about wearing a union, or a company, button, and, on the basis of my credibility resolution, I shall recommend dismissal of those allegations of the complaint.

However, Conner essentially admitted Stevenson's account of their second conversation.

k. *Interrogation of Stevenson by Cummings and Duncan*

Paragraphs 17 and 18 of the complaint allege that Respondent, by Cummings and Duncan, in violation of Section 8(a)(1): ''In mid to late July 1990 . . . at the Wayne Avenue facility, interrogated an employee concerning the employee's Union sympathies.''

Stevenson testified that, about 2 weeks before the August 10 election, when he was in a hallway, he was approached by Cummings and Duncan. According to Stevenson:

> The conversation was about me wearing the 115 button. They stopped me and asked me why was I wearing a 115 button. I explained to them then that, you know, I spoke to Ty [Conner] about it and he said it was okay for me to wear the button which I supported, and they left me alone.

Cummings and Duncan were called by Respondent. Cummings flatly denied that she ever saw Stevenson wearing a union button; Duncan testified that he could not remember Stevenson ever wearing a union button.

[30] See fn. 9, supra.

Cummings is the customer service manager; Duncan is in the construction department, but he was not Stevenson's supervisor at the time. I do not believe that Stevenson picked out these two individuals, with whom he did not even deal, to lie about. Stevenson appeared credible while giving this testimony, and I do credit it.

l. *''Troublemakers'' remark to Bennett by Rawls*

Paragraph 8(b) of the complaint alleges that Respondent, by Rawls, in violation of Section 8(a)(1): ''In mid to late July 1990, told an employee that two other employees, who were engaging in Union activities, were 'troublemakers.''' Alleged discriminatee Lynetta Bennett testified that in July, at a time she was in Rawls' office:

> [Rawls] said that Eric Funchness had changed since he transferred to construction. And I said, well, he probably was glad to get away from all those customers. And then he, then we started talking and I said, well, a lot of people had changed since the union activity had started. And he said that, he went on to name people as troublemakers, like he said Franz Jolicouer and Tony Defabis were named as troublemakers. And the conversation just was like general conversation and it kind ended, but it was no more talk about the union after that.

On cross-examination, Bennett acknowledged that Rawls did not say why he considered Jolicouer and Defabis to be ''troublemakers.''

Rawls denied this testimony by Bennett; however, I found Bennett to be credible on the point, and I do credit her testimony.

m. *Interrogation of Sweeney by Harris*

Paragraph 16 of the complaint alleges that, in violation of Section 8(a)(1):

> In or about late July 1990, the Respondent, acting through Jeff Harris, at the Wayne Avenue facility, interrogated an employee concerning the employee's Union activities.

Current employee Michael Sweeney, a lead service technician, testified that, in June or July, he was at the Northeast facility (not the Wayne Avenue facility) when Harris was there. According to Sweeney:

> He just like maybe started out like I heard you're working for the union. I'm not exactly sure how it started. . . . Yeah, like I think I told him to mind his own business or whatever, and that was the end of the conversation.

On cross-examination, Sweeney acknowledged that he had been an open supporter of the Union and that he and Harris were personal friends who played football together. When asked if Harris' question had not been in the context of their friendship, Sweeney replied, ''The way I think about it was he was trying to get some information out of me about what was going on.''

Harris denied any union-related conversations with Sweeney other than to mollify Harris after Harris became upset at having to attend campaign meetings that were conducted by Conner. However, Harris did not specifically deny telling Sweeney that he had heard that Sweeney had been ''working for the Union''; Sweeney appeared more credible than Harris, and, to the extent they differ, I credit Sweeney.

n. *''Vote No'' button distribution to Heath by Green*

Paragraph 10(b) of the complaint alleges that Respondent, by Green, in violation of Section 8(a)(1):

> In the first week of August, 1990, by distributing ''Vote No'' buttons directly to employees, interrogated employees concerning their Union sympathies.

Current employee Heath testified that, about a week before August 10 the election, he came to work and, as he did so, he walked by a table on which were placed ''Vote No'' and ''Vote Ty'' buttons, and company campaign literature. Heath testified:

> Lynn Green, who was the Human Resources Manager at that time, she had a box and she said, here, take one. I said, nah, I didn't want to take one of the buttons.

On cross-examination, Heath denied that Green had the buttons there, just to take or not take.

Green, who was called as a witness by the General Counsel flatly denied, when asked by Respondent, that she tendered any button to any employee before the employee asked for it. I credit this denial by Green who was obviously present to help the General Counsel in any way that she thought she honestly could and who would not have made this denial if it were not true.

On this credibility resolution, I shall recommend dismissal of this allegation of the complaint.

o. *Interrogation of S. Gardner's group by Donahue*

Paragraph 11(c) of the complaint alleges that Respondent, by Donahue, in violation of Section 8(a)(1): ''About the first week of August 1990, interrogated employees concerning their Union sympathies.'' Alleged discriminatee Steven Gardner testified that, about a week before the August 10 election:

> Me and Herman Heath and a couple of other guys were sitting in the construction room and John Donahue had walked in and asked us all what we thought about the union, and no reply was stated at the time. Nobody said anything.

Heath did not testify to this event.

In his direct examination on this issue, Donahue was first led to state that he remembered interrogating no one during the first week in August. After objection, and recast of the questions in proper form, Donahue flatly denied the incident. Donahue (whose lack of credibility is demonstrated above and below) became less convincing than Gardner during the exercise; I credit Gardner.

p. *Announcement of direct deposit benefit*

Paragraph 7(c) of the complaint alleges that, in violation of Section 8(a)(1), Respondent, by Conner:

> On or about August 3, 1990, by memorandum, announced the implementation of a direct deposit program in order to discourage its employees from selecting the Union as their bargaining representative.

Conner's August 3 memorandum to all Philadelphia employees states:

> Some time back you had requested that we give strong consideration to providing a payroll direct deposit service. At that time, the belief was that this service would provide greater convenience on payday to those who choose it.
>
> I am pleased to announce that we have now worked out many of the mechanics of making this service available to you.
>
> It is our plan to implement ''direct deposit'' effective Friday, September 28th with the two pay periods prior to that used for dry runs. The effect is that for those of you who choose to use it, your pay which would be received on September 28th can be deposited in one of the several banks by means of ''direct deposit.''
>
> As I had previously stated, it would be necessary to limit the direct deposit to a targeted list of sizable banks.
>
> Those banks are as follows: [Seven Philadelphia area banks are listed by name.]
>
> We will be getting back to you shortly with both the forms and detail that will be required to sign you up for the service.
>
> In the meanwhile, please contact myself or the Human Resources Department if you have any questions.

Conner testified that he held several meetings with the employees after he was hired in April. Conner testified that, at one of these meetings, some employee asked why the corporate staff (at the downtown Philadelphia Comcast headquarters) had direct deposit and employees at the Wayne Avenue facility and Northeast facility did not. Conner replied that he would check into it.

Conner was asked on direct examination, and he testified:

> Q. Did you look into it?
>
> A. Yes, I did. Looking into it in this case meant I picked up the phone and called Paul Gillert and said, help, what's going on with this issue.
>
> Q. What did Mr. Gillert say?
>
> A. Paul was kind of shocked. His response was that he thought they already had direct deposit, because they had had it in place for sometime down at the corporate offices.
>
> Q. But did Mr. Gillert say he was going to do anything or was there anything further with that conversation?
>
> A. He said he'd look into it, and that there were a couple of people he needed to talk with. He identified one person by name and that was about it.
>
> Q. What was your next contact with the direct deposit issue after that conversation.
>
> A. Well, [Gillert] and I had several conversations about it. At one point he . . . said he had some conversations with [Mary Lou Coburn, a payroll manager]; she was supposed to get back to him, so things dragged a bit at that point while he was waiting for Mary Lou to get back to him. During that time, virtually nothing happened.
>
> Q. At what time did the issue of direct deposit appear that it was beginning to move toward some resolution?
>
> A. By my best recollection it would have been sometime in late July. Paul had gotten back to me at that point, said that he had talked to Mary Lou. In fact, I got on the phone and I talked to Mary Lou, and we talked about how we could try to make this thing happen. At that stage Mary Lou just started to lay out for me what she thought was appropriate if we were going to make this happen.
>
> Q. What did she tell you?
>
> A. Well, she basically said that she needed to make sure that it was done properly and people didn't have problems with their pay, that there would be a couple of dry runs, and she also pointed out that you just couldn't pick any bank you wanted to, there had to be a limited number of banks.
>
> Q. So, what did you do after you talked with her?
>
> A. Talked to her about the human resource area, asked them to take a mini-survey of areas three and four, just to make sure that these major banks that are out there, I'm talking about Fidelity Bank, and Provident, and banks of that type, were adequately scattered around the areas so that they would be available.
>
> Q. What then happened on that issue?
>
> A. We began to compile the information. I took it as a project and turned it over, quite frankly, to the human resource area to put the finishing touches on it. They came back to me, and we ultimately put it in place.

Gillert, the corporate vice president in charge of personnel, testified that when Conner brought the issue to him:

> Regarding automatic payroll deposit, I was shocked. I was shocked because I had assumed, quite bluntly, that he had automatic deposit in the surrounding systems in '88.

Gillert further testified that he told Conner (who was hired in April 1990) to go ahead with the implementation of a direct deposit program, because ''I did not perceive it as a benefit.''

q. *Interrogation of Bennett by Donahue*

Paragraph 11(b) of the complaint alleges that Respondent, by Donahue, in violation of Section 8(a)(1): ''On or about August 3, 1990, interrogated an employee about the employee's Union sympathies.'' Alleged discriminatee Lynetta Bennett testified that in July Respondent issued a memorandum stating that it would not debate the Union for certain reasons. Bennett learned of the memorandum while talking to others outside the warehouse at the Wayne Avenue facility. Bennett

stated to the group that the memorandum, somehow, made a liar of Rawls. A heated debate ensued. At some point, Donahue joined the fray. When Bennett started walking away from the argument, according to Bennett:

> [Donahue] followed me back to my work station. He was still trying to explain the difference between why they couldn't and they wouldn't, or whatever he was trying to explain as far as the company standpoint, as far as the debate went.
>
> And I said to him, I was really getting sick and tired of all these meetings. And at this point, he said, you know, well, you know, what about the election? And I said, well, everybody is pretty much well decided on how they are going to vote at this time.
>
> And he asked me, you know, how I was going to vote. And I repeated what I said, everybody was pretty well decided at this point.

Donahue testified on direct examination that he remembered the Company stating that it would not debate the Union. He was then ''asked,'' and he testified:

> Q. [All] right. And that [the issuance of the memorandum] is apparently the time frame in which Lynetta Bennett says that she called Paul Rawls a liar which results in a number of events leading up to your interrogating her about her union sympathies.
>
> A. I'm sorry, I don't know anything about that.

This dialogue between attorney and client impressed me as being less than convincing as a denial. I credit Bennett over the demonstratively untruthful Donahue.

r. *Interrogations of, and threats to, Takach by Brandt and Davis*

Paragraph 15(c) of the complaint alleges that Respondent, by Brandt, in violation of Section 8(a)(1): ''On or about August 7, 1990, threatened an employee with unspecified reprisals because of the employee's Union activities.''

Paragraph 13 of the complaint further alleges that, in violation of Section 8(a)(1):

> On or about August 3, 1990, the Respondent, acting through Michelle Davis, outside the Northeast Avenue facility: (i) interrogated an employee concerning the employee's Union sympathies and (ii) threatened an employee with unspecified reprisals in order to discourage employees from selecting the Union as their bargaining representative.

Current employee Charles Takach, a converter prep technician, testified that, at some point during the campaign, he was notified that his driver's license was going to be suspended for some unspecified period of time. Respondent, through its supervisor Brandt, arranged to have a trainee drive Takach to his assignments during that period. After the arrangements were made, but before the suspension was imposed, according to Takach:

> I was in my truck lining up my work, you know, packing my stuff up. I was just about ready to leave, and [Brandt] came up to me, you know, did he—and he asked me in another course of a conversation, did I think that the union would, you know, still keep me employed if I lost my license like the company did? I says, you know, I thought that it would because I, you know, had been involved with a union before, but, you know, it didn't go any further than that. He said that he doubted it, but it didn't really go much further.

Brandt testified that he used the opportunity to point out to Takach that he had been afforded the accommodation during the period of suspension without a union being involved. Brandt did not specifically deny asking Takach during the exchange if, with the presence of the Union, the same result would accrue. To the extent his testimony can be said to contain such a denial, I do not credit it.

Takach further testified that one morning, about 2 weeks before the August 10 election, and after this exchange with Brandt, he was in the parking lot when Davis was talking with several employees. At the time, some individuals were handbilling for the Union just outside the parking lot entrance. Takach walked away from the group in the parking lot and toward his service truck. Davis followed him. According to Takach:

> Just, you know, in a light conversation, how am I doing and stuff like that, and what did I think about, you know, all of this stuff, and I said I didn't know what to think, and when, you know, she asked me well, you know, do you support the union? I said—I told her that was none of her business, as best I can recall. . . .
>
> We were having a conversation on—because I was going to, you know, lose my license for a short time and we were pretty good friends too. . . . She just asked, you know, when I was going to lose them [sic], and I told her that was none of her business also.

Davis appeared as a witness for the General Counsel. On her direct examination, she was not asked about this incident. On cross-examination, she was led to a conclusionary denial that she interrogated anyone. This denial was probative of nothing; I credit Takach.

s. *Interrogation of Funchness by Rawls*

Paragraph 8(c) of the complaint alleges that Respondent, by Rawls, in violation of Section 8(a)(1): ''On or about August 3, 1990, interrogated an employee concerning the employee's Union sympathies.''

Alleged discriminatee Funchness testified that just before the August 10 election, Cicatello handed out ''Vote No'' and ''Vote for Ty [Conner]'' buttons at the Wayne Avenue facility. Funchness asked Cicatello if, because the employees were allowed to wear ''Vote No'' buttons, he could wear a union button. Cicatello told Funchness to ask Conner who was then in the building. Funchness went to search for Conner, and met Rawls on the way. Funchness testified that: ''Mr. Paul Rawls asked me where was my 'Vote No' button. . . . I told him that it was up on my desk.'' Funchness then found Conner; Conner told Funchness that he could wear a union button ''if you [feel] as though it [is] necessary.''

On cross-examination, Funchness acknowledged that his pretrial affidavit states that he asked Conner if he could wear a union button, Conner said, ''Yes, go ahead,'' and then, later, Rawls asked ''Where is your button?'' Funchness testi-

fied that, on this point, his memory at trial was better than his memory when he gave the affidavit on August 28, 1990.

Rawls denied ever asking Funchness where his ''Vote No'' button was; he was not asked to deny asking Funchness where ''your'' button was.

I believe that Funchness' memory would have been better during the month of the event. Although Rawls did not deny asking Funchness where ''your'' button was, Funchness had not, at trial, testified that Rawls had done so. Under the circumstances, I cannot credit Funchness' trial testimony on this point, and on the basis of this credibility resolution I shall recommend dismissal of this allegation of the complaint.

t. *Bargaining threat by Gillert*

Paragraph 14 of the complaint alleges that, in violation of Section 8(a)(1):

> On or about August 7, 1990, the Respondent, acting through Paul Gillert, at the Wayne Avenue facility, during a meeting with employees, by telling employees that the Respondent would not change any of its policies for 97 employees, indicated to the employees that it would be futile for them to select the Union as their bargaining representative.

Current employee Heath testified that in July:

> It was a big meeting. [Gillert] had everybody, customer service, warehouse, technical employees, in the monthly meeting type of situation, and it was basically a meeting about the organization that was going on with the Teamsters and the information that he could give us about why we didn't need a union, trying to answer some questions.
>
> At that time, some of the other employees, like the customer service reps, they were surprised, because I guess they weren't included in some of the discussions that were going on about the meetings about the union. And some of the stuff that Mr. Gillert was talking about was kind of puzzling, basically about how if there were to be an election, and they—that the union would have won the election, that the bargaining between them would be would like your benefits would be like a clean slate, like you wouldn't have any benefits or anything.
>
> That didn't sound right to me, and also that there would be a lot of negotiation, hardball playing, that eventually the strike may come up. If it does, you would—benefits. Basically, there would be a hardball playing that would be involved if any negotiation were to go on. And it was very puzzling, I didn't understand the instance of when he said there would be like a clean slate, and a lot of people had questions about that also.

Heath was asked nothing about the Gillert speech on cross-examination.

Alleged discriminatee Funchness testified that 2 or 3 months before the August 10 election, Gillert addressed the employees at the Wayne Avenue facility. Funchness testified that Gillert said:

> [T]he union, in order to get things you probably would have to strike, and the union had ways of making employees strike and that Comcast was not going to trade off, was not going to pay any health benefits for 97 employees. I mean they had a company policy on many different cable systems, they were going to stick with their policies, and they were not basically going to change anything for 97 employees.
>
> The reason why I remember the stuff about strikes was this around the time of the Bell strike that he mentioned that in the meeting about the strike against Bell Atlantic and he mentioned to us that it was all about health benefits and that the employees were going to lose out and that, you know, pretty much that we would have to strike for a long period of time to get any results from Comcast.

On cross-examination, Funchness acknowledged that Gillert did not say that Respondent would not bargain with the Union if selected by the employees.

Alleged discriminatee Stevenson testified initially, and he insisted on cross-examination later, that Gillert said, flatly, that Respondent would never bargain with the Union.

Finally, alleged discriminatee Steven Gardner testified that in the meeting:

> [Gillert] was saying that there would be a strike and that he held up a piece of paper, a blank piece of paper, saying this is what you are going to start out with and the benefits would be decreased. . . . you might lose a few benefits if the union would represent you. That was basically it, that's all I can remember.

On cross-examination, Gardner flatly denied that Gillert said that Respondent would not bargain with the Union. Indeed, he acknowledged that Gillert said, ''The union and the company would get together and they would negotiate. . . . And then he said something to the effect about you start with a blank sheet and you build from there.''

Gillert denied the remarks relied on by the General Counsel. In view of the facts that the General Counsel's witnesses conflicted on many of the remarks in dispute, and that Gillert is sophisticated enough of a lawyer to know better than to advance the crude arguments attributed to him, and because of Gillert's credible demeanor in testifying on this issue, I credit Gillert's denials.

On the basis of this credibility resolution, I shall recommend dismissal of this allegation of the complaint.

u. *Termination of Lynetta Bennett*

(1) Contentions and case-in-chief

As noted, the complaint, at paragraph 20(a), alleges that the January 7, 1991, termination of Lynetta Bennett violated Section 8(a)(3). Respondent contends that Bennett was permanently laid off solely because there was no need for the job position that she held.

Bennett was hired by Respondent in August 1988. During all of her tenure, she was formally classified as a bench technician; however, from January through June 1990, Bennett

was assigned to engineering design (drafting) work,[31] and, during parts of late 1990, she was assigned to work in the warehouse.

Bennett wore a union button ''from time to time'' during the 1990 campaign, according to her testimony. Former Human Resources Supervisor Lynn Green testified that, during management's campaign strategy meetings conducted by Peddrick, Bennett was identified as an employee who had stated to others at the Wayne Avenue facility that the employees would be better off with a union. Rawls acknowledged that ''Lynetta was very open with her comments about her support of Local 115.''

I have previously found that Donahue and Rawls questioned Bennett about how she was going to vote in the August 10 election.

During the last few weeks of 1990, Bennett worked in the warehouse during the mornings; Bennett testified that she volunteered for that assignment because ''they had a shortage in the warehouse.'' However, Rawls, her immediate supervisor at the time, testified that he had asked the warehouse supervisor to give Bennett warehouse work to do then because, at that time, there was little bench technician work for Bennett to do. On this point, mostly because of certain conflicts during Bennett's cross-examination, I found Rawls more credible than Bennett.

Bennett described her work as a bench technician as follows:

> First off, mainly to maintain all of the electronic line equipment, including power supplies. Also, I was to check and kind of recheck the equipment as it went out for repair, just to verify, like a fixed code when it came back. And also, I was in charge of shipping and receiving and all invoices dealing with shipping the equipment to the manufacturer, from the manufacturer and also to NCS, which is a local repair company that we use. And also do minor repairs on the equipment and also to assist in head-end.[32] Work in the head-end and working with the head-end engineer. And any other related duties as assigned.

Bennett listed the equipment she worked on as:

> All the amplifiers, like the bridger amplifiers, the return amplifiers, status monitoring equipment, the power supplies, the mini-groups as well as the main power supplies. And power doubling and feed forward amplifiers. Any passing device, like anything that passed electricity, not just the cable signal.

Bennett testified that construction technicians and line technicians used the equipment that she worked on.

Cicatello and Rawls testified that Bennett did essentially no repair work, and that she functioned only as something of a shipping clerk. I would not give a job title controlling significance, but Bennett was classified as a ''technician'' for some reason. Bennett appeared credible in giving her last-quoted testimony, and I do credit it.

Bennett testified that on January 7, 1991, she was called to Rawls' office where she met with Rawls and William Kelly, Respondent's director of human resources. Bennett testified:

> Well, [Rawls] didn't say anything, Will [Kelly] did all the talking. And he said as effective Monday, that would be the 7th of January, my job was no longer necessary and it was being eliminated. . . . He gave me the conditions of my layoff, like severance pay and as far as how my benefits were remaining until after my severance pay ran [out]. And that he, Will Kelly said that he would assist me by talking to different vendors and trying to get me another job. . . . [H]e also said that in a few weeks that they would be having, they would have some customer service jobs open, opening, and I would be free to apply for them.

On cross-examination, Bennett acknowledged that during the first 6 months of 1990, when she was assigned to do design work, no one was designated solely to do the bench technician work; however, Bennett also testified, ''It didn't get done, because when I resumed my work position, it was tons of work waiting for me.''

On cross-examination Bennett further acknowledged that during her last 6 months of employment, Rawls, then her supervisor, required her to keep a log of what she did each day. She also testified that the first notebook that she used for the log (which Rawls purchased for that purpose) was stolen at some point. She secured a second such notebook for listing of her activities; it was left at the premises when she was laid off.

(2) Defense for Bennett's termination

Cicatello testified that Bennett returned to her bench technician job after a 2-month pregnancy leave on November 1, 1989. She did the bench technician work for 2 more months when ''I had asked her to work temporarily in the construction department doing some drafting.'' That assignment lasted for approximately 5 months during which time line technicians and technical supervisors did the bench technician work. Cicatello testified that during that 5 months all the bench technician work got done, and the line technician work got done, as well.

Cicatello testified that, when Bennett returned to the bench technician job (about June 1990), he told Rawls to monitor Bennett's activities, ''because I believed there was—there wasn't enough work to keep somebody busy full time.'' Cicatello testified that he based this belief on the fact that others had been able to do her work while Bennett was on pregnancy leave or while she was assigned to drafting.

Rawls testified that he purchased the notebook for use by Bennett; he asked Bennett to keep account of her time in that book. Twice Rawls examined the book and found that Bennett had not followed her instructions; the third time he attempted to examine the book, Bennett reported to him that the book had been ''lost''; Rawls denied that Bennett claimed that the book had been stolen. Rawls further testified that the book had been kept at the Wayne Avenue facility, ''under lock and key.''

[31] This was after a December 31, 1989 layoff of the engineering design employees, as discussed infra.

[32] The head-end, spelled various ways in the transcript, is the point at which signals that are received from satellites are transferred to the cable distribution system.

Rawls told Bennett to get another book, which Bennett did. Rawls checked that book once; Bennett had not filled out her hours, as instructed.

Conner testified that at some point in December Respondent was ''looking at making reductions in head count.'' Conner went to Cicatello and told him that ''he needed to contribute at least a couple in the way of reduction to the head count.'' Conner testified that Cicatello ''came back and said he had analyzed his end of the business, and that there were two positions that he felt he could do without. . . . One position was the bench tech job down at Wayne Avenue, and the second position was the facility supervisor up at Northeast Avenue.''

Conner was asked, and he testified:

> Q. During that discussion did the subject of union come up in relationship to those lay offs?
>
> A. Yes, it did.
>
> Q. How did that come up?
>
> A. Just Randy pointing out that the perception would have been that it was pro [sic] union.
>
> Q. What did you say in response to that to Randy?
>
> A. I asked him whether or not he needed the job, and whether he could justify the job in terms of what that individual was doing on a day-in, day-out basis, and how he had selected that particular position. His response was that he really didn't need it, it proved not to be a full-time job. I said, well, you've got your decision.

Sydney Anderson is a line technician to whom Respondent assigned the bench technician work after Bennett's layoff. Anderson testified that, as Bennett's replacement, he spends no more than 3 hours a week doing bench technician work; some weeks there is no bench technician work to do. Otherwise, he does his line technician duties.

(On brief, the General Counsel attempts to make much of the fact that on cross-examination Rawls flatly denied that Bennett worked any overtime during the summer and fall of 1990; then Rawls admitted error when shown Respondent's Exhibit 83(g) which reflects that during the period from July 20 through October 26, Bennett worked overtime on three occasions. However, these records do not show whether the overtime was worked in the warehouse or at the bench technician job, and Bennett did not claim that she worked overtime in her capacity as bench technician.)

v. *Layoff of the construction technicians*

(1) Contentions and case-in-chief

On February 8, 1991, Respondent permanently laid off the six employees who were then employed in its construction department as construction technicians: Carmen Favano, Eric Funchness, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson.[33] Paragraph 20(b) of the complaint alleges that the layoff violated Section 8(a)(3). The General Counsel's theory is that Respondent's supervisors knew that the construction technicians were prounion and that Respondent laid off these employees for that reason. The General Counsel specifically contends that Respondent laid these six employees at the time that it did because Respondent feared the effect of their voting in any rerun election that might occur pursuant to the November 28, 1990 order of the Regional Director that a hearing be held on the objections to the August 10 election. Respondent contends that the construction technicians employees were laid off solely for economic reasons; they were construction employees and Respondent's construction operations had been completed to the point that it was more economical to contract out any foreseeable construction work; also, Respondent contends that the layoff of the construction technicians was part of a larger plan of reductions in force.

The heavy construction work involved in Respondent's cable distribution operations has always been done by outside contractors. The in-house construction crews, the employees involved here, for the most part, followed the contractors' crews and placed cable on, or around, buildings and other structures as needed.

Richard Gardner testified about the duties of the construction technicians:

> We were in charge of running cable, new cable, repairing old cable. We were in charge of joint [with contract crews] trench projects, aerial cable, wall brackets, splicing cable, replacing [brackets], replacing any damage to any hardware, such as wall brackets or other stools [phonetic], any drop lines that came down, we repaired those. That's basically it.

Gardner was made a construction technician (or ''maintenance technician,'' as they were sometimes called) at some time before November 1989; Steven Gardner transferred to the position of construction technician in January 1990; Stevenson did so in February; and Funchness did so in July 1990. The record does not disclose when Favano and Wilson became construction technicians. Funchness, the Gardners, and Stevenson testified that when they were made construction technicians they were not told that their jobs were temporary, and this is not disputed.[34]

There is no question that Respondent had knowledge of the sympathies of the construction technicians. Former human resources manager, Lynn Green, who was called by the General Counsel, testified that, beginning in March or April, she and other supervisors met regularly with Peddrick. According to Green, during some of those meetings, the supervisors listed for Peddrick which employees they thought were for, or against, the Union. Peddrick made a tally of numbers on a blackboard. Green testified that during such sessions, Funchness, Gardner, Heath, Favano, and Stevenson were identified as the chief employee-organizers. Green further testified that the supervisors in such meetings were told not to bother to talk to the employees of the construction department, because they were so strongly for the Union.

In addition, on cross-examination by the Union, Conner acknowledged that, during the preelection supervisory meetings conducted by labor consultant Peddrick, Peddrick opined that, in the construction department, ''pretty much everybody'' held strong prounion sympathies; at the time, the only

[33] Wilson and Favano did not testify; the other construction technicians did.

[34] I do not credit Stevenson's testimony of certain job security guarantees that he got from Cicatello and Rawls during his employment interviews; this is because of credible denials and documentatary evidence in conflict with Stevenson's testimony.

nonsupervisors in the construction department were the six construction technicians and one quality control employee.

As evidence of specific animus toward the known union sympathies of the construction technicians, the General Counsel relies on testimony by Green that, about a week after the August 10 election, her supervisor, William Kelly, and Customer Service Supervisor Barbara Cummings were in Green's office discussing with her the employees of the construction department. Green testified, ''Will Kelly had said that if those same employees were still employed with Comcast the same time next year, that he would be disappointed.'' Green testified that later the same day, when she, Kelly, and Rawls were in Rawls' office, Kelly repeated the remark.

Cummings testified, but not about the alleged remark by Kelly in Green's office. Rawls denied that he ever heard Kelly say anything like what Green attributed to Kelly. Kelly denied the remark. I have considered certain testimony by Kelly about the tenure and the (voluntary) termination of Green; however, I do not believe the alleged prior difficulties that Green had while working with Respondent would cause any rational person, such as Green appeared to be, to commit perjury. I found Green to be more credible than Kelly or Rawls, and I do credit her testimony.

As noted, the General Counsel contends that Respondent laid off the construction technicians because it feared the impact of their voting in any election that might be held pursuant to the November 28 order of the Regional Director. The General Counsel argues, inter alia, that the construction technicians were included in Respondent's 1991 budget, and that they were not taken out until after November 28.

Doyle testified that the 1991 budget was completed in October or November 1990. The budget was not placed in evidence. In support of the contention that the construction technicians had been budgeted for 1991, Funchness testified that:

> I talked to [Rawls] in January of 1991. What had happened was two other employees [Bennett and a supervisor] had been laid off, so I had some concerns. So I went to Mr. Rawls and I asked him basically like what was the situation, what was going on, why did they lay two employees off?
>
> He said, well, we are coming to a slow down mode from a new build to operations.
>
> So I said, okay, how does that affect me? And he said that, well, basically, it doesn't affect me at all, you know, we have plenty of construction work [and] we have [been] budgeted for that year of 1991.

Funchness testified on cross-examination that Steven Gardner and Stevenson were present when Rawls made this remark.

Rawls denied these remarks attributed to him by Funchness. Rawls testified that in January 1991 there was little work for the construction technicians to do, and Respondent argues that it would have been illogical for Rawls to make such a statement. Moreover, Cicatello testified that (as discussed below) a contract to do the construction technicians' work had been executed by the time of this alleged exchange, and this is another factor which would logically prevent Rawls from making such a representation to Funchness. Finally, although Funchness testified that Steven Gardner and Stevenson were present, the General Counsel did not ask those employees (who testified after Funchness) about the matter.

In spite of these factors that would logically appeal to a crediting of Rawls, I credit Funchness. A contract for some construction work had been executed by December 31, but, as Cicatello's testimony made clear, under that contract Respondent was not bound to send all its construction technician work to the contractor (and, in fact, the construction technicians did some construction work in 1991 before they were discharged on February 8). Therefore, I reject Respondent's contention that it would necessarily have been illogical for Rawls to have made the statement attributed to him by Funchness.

I found Funchness credible, and I consider Rawls' statement to be an admission that the construction technicians were in the Respondent's 1991 budget.

However, there are other factors that compel the conclusion that the construction technicians were in the 1991 budget: (1) The construction technicians were allowed to report for work after January 1, 1991; if they had not been budgeted for 1991, this would not have happened.[35] (2) If the construction technicians were, somehow, not in the 1991 budget, Respondent would have produced that budget. It did not do so. (3) However, Respondent did produce evidence of extensive deliberations over the February 8 layoff; the deliberations continued through February 6; these deliberations would have been unnecessary if the construction technicians were already out of the 1991 budget at the time Rawls spoke to Funchness. These reasons fortify my conclusion that Funchness was telling the truth when he testified that Rawls said, in January 1991, that the construction technicians were in the 1991 budget, and for these reasons, I find that the construction technicians were, in fact, in that budget.[36]

At the time of the February 8, 1991 layoff, all of the construction department employees were assigned to construction projects. Funchness testified that the layoff of the construction technicians was handled in this manner:

> Well, I came to work as usual and what happened was we were about to leave, and then we were turned around and told [by Plant Manager Rawls] to go back upstairs to our office and to wait there; we were going to have a meeting. . . . He told us to go upstairs and he told the line techs to go out to work.
>
> So we sat upstairs and we waited, I guess till around 10:00 and they called a meeting. Mr. Paul Rawls, Will Kelly and Randy Cicatello [were present for management]. And Will Kelly did all the speaking for the most part. He said that our services were no longer needed at Comcast and we were to turn in all of our tools and we were to leave the building immediately and turn in our ID's.

The construction technicians were escorted from the premises by armed guards. The Gardners and Stevenson described the terminations in essential accord with Funchness' testimony,

[35] Certainly, as discussed infra, when the design engineering employees were excised from Respondent's plans for 1990, and thereafter, they were terminated as of December 31, 1989.

[36] Further support for the conclusion that the construction technicians were included in the 1991 budget lies in memoranda by Doyle and Conner, as discussed below.

and there is no dispute about how the terminations were carried out.

As evidence of discriminatory treatment, the General Counsel points to the fact that, when the construction department's design engineers were laid off in 1989, as discussed infra, they were given 6 weeks' notice. Additionally, Rawls acknowledged on cross-examination that he was present on the design engineering employees' last day; he admitted that he did not see armed guards escorting them from the property, and no witness testified that they were escorted from the property in that fashion. I find that they were not so escorted.

(2) Defense for the layoff

(a) *Management deliberations*

Michael Doyle reports directly to the president of Comcast. Doyle testified that he was appointed vice president of Comcast's Atlantic-Pacific region in November 1988; when so appointed, he was instructed by Comcast's president to bring Comcast's Philadelphia area from the ''construction mode'' to the ''operational mode,''[37] something that Doyle had previously done at Comcast's Baltimore-area systems. The construction mode is a state in which new construction is being done; as noted, the heavy construction work was done mostly by ''outside'' contractors, with Respondent's construction departments doing the followup work to that construction.

In late 1989, the construction department consisted of about 30 design engineers, 1 quality control employee who monitored the work of outside contractors, and the 6 construction technicians. Doyle testified that in late 1989 he asked Donahue, Respondent's director of engineering, why the entire maintenance department could not be terminated. Donahue told Doyle that he could terminate all but seven employees in the department. Those seven were the construction technicians and the quality control person. The construction technicians were still needed, Donahue told Doyle, to follow the contract construction crews and do ''clean up'' work, such as moving end attachments where customers specifically wanted them.

On December 31, 1989, after having given them 6 weeks' notice, Respondent permanently laid off the approximately 30 engineering design employees in its construction department. The exact number of engineering employees that were then laid off is not clear in the record. Donahue testified that there were 32 engineering positions eliminated, but fewer employees than 32 were actually laid off on December 31, 1989, because Respondent had not been filling positions in engineering for some time.[38] After the layoff of the engineering design employees, the only employees of the construction department who remained were the quality control person and the construction technicians.

Donahue testified that, by the fall of 1989, all construction was complete except for three phases: various multiple dwelling units, blocks in which property owners denied them access, and government housing projects. Donahue further identified a January 29, 1990 letter that he wrote to the Philadelphia cable regulation authorities stating that construction was 99 percent complete in Philadelphia area 4 and 95 percent complete in area 3.[39]

Through Doyle, Respondent further produced documentation reflecting a decline in Respondent's business. The numbers of new cable customers decreased from a high of 58,331 in 1988, to 36,136 in 1989, to 18,698 in 1990, to 3,331 in 1991. These figures include new customers from old construction as well as new customers from new construction, both of which would affect the need for the construction technicians.

Doyle identified a November 1990 financial report that he described as unsatisfactory. Doyle and Donahue testified that in November Doyle instructed Donahue to submit a proposed table of organization that would reflect a 70–80 personnel reduction. Doyle and Donahue testified that, also in November, Donahue submitted such a plan; it included recommendations, with no supporting data, to contract out all construction activity and all installation activity.[40] Both Doyle and Donahue testified that, on receipt of that recommendation, Doyle told Donahue to do an analysis of the cost effectiveness of his proposal to make reductions in the installation and construction departments.

On November 19, Doyle sent a memorandum to Conner also stating that he desired a personnel reduction of 70 to 80 in Philadelphia. In the memorandum, Doyle suggests areas where personnel could be reduced, including customer service and construction. Doyle tells Conner in the memorandum that he thinks that the construction department can be completely eliminated and that Donahue and Cicatello have been instructed to analyze of the costs of contracting out the installation and service work and ''they can take a strong look at the construction arena.'' The memorandum concludes:

> It is my suggestion that we perform these analyses and look for a reduction in head count of 70 to 80 people. I am also suggesting that we be prepared to move on this analysis by both attrition and layoff as early as the first quarter in 1991.[41]

Doyle identified an analysis of the installation activity that was submitted by Donahue. Donahue's conclusion was that Respondent could save $130,000 annually by contracting out that work.

Doyle and Donahue identified an analysis of the construction activity that was submitted by Donahue to Doyle on January 14, 1991. The document uses as its base, Respond-

[37] Note the similarity to what Rawls told Funchness. This fortifies my conclusion that Funchness testified truthfully that Rawls said that the operation was going to a different mode, but the construction technicians were still in the budget; it further fortifies my conclusion that Rawls was testifying falsely when he denied any such conversation with Funchness.

[38] If this were not true, Donahue would not have so testified. Accordingly, I discredit Doyle's testimony that the number of engineering design personnel laid off on December 31, 1989, was ''35, 36, whatever.''

[39] This letter was apparently written in support of a request (testified to by Doyle) for return of Respondent's construction bond.

[40] Such a plan, undated, was identified by both Doyle and Donahue.

[41] This memorandum further fortified my conclusion that the construction technicians had been included in the 1991 budget (which was completed in October 1990). If they already had been excluded, this memorandum would not have been necessary.

ent's construction activity over the August–October 1990 period. Donahue's stated conclusion is that Respondent could have saved $4100 in labor costs by contracting out the construction work during that period. Donahue testified that, to arrive at this conclusion, he compared what Respondent actually spent to do the construction department work with a projection of what the cost would have been under a contract that existed at the time that he made the comparison. The contract to which Donahue referred was not placed in evidence in its entirety; Donahue identified only two pages of ''menu'' rates from the contract. These rates were prices for jobs, either by the task or by the footage of cable that is strung or laid.

(Although Respondent did not produce, in its entirety, the contract to which Donahue referred in his analysis, it appears to be the same one to which Cicatello referred in his later testimony. Cicatello testified that a contract for doing the construction department work was entered in November or December 1990 to be effective January 1, 1991, with a firm named Adderly Industries. On the fourth page of the menu rates which Donahue used for his January 14, 1991 recommendation to Doyle, there is, in some unidentified handwriting, ''J.D. [space] Adderly's New contract [space] 1991.'' No other contract with Adderly was produced. Therefore, I conclude that Donahue was referring to the contract with Adderly Industries that was entered into in November or December 1990 for 1991, when he testified that he used an existing contract to make his analysis of what it would cost to contract out the construction department work; and I shall refer to that contract as the Adderly contract.)

On cross-examination of Donahue, it was brought out that, when he created the January 14, 1991 analysis of the construction activity, Donahue did not have the August–October work orders for the construction work that he used as a basis for his comparisons; such work orders would have shown how much manpower was actually used. Donahue testified that, instead of the work orders, he used other documents that contained summary descriptions of each job; the summary descriptions were such as ''reattached to pole'' and ''located feeder & drops.'' Donahue testified that, using the summary descriptions he assigned ''points'' for what he thought, based on his experience, a given job probably took in terms of labor costs to Respondent. Also, the Adderly menu prices, being based on a per-job or a per-foot-of-cable basis, rather than an hourly basis, were not susceptible to direct comparison with what it had cost Respondent for the hourly paid unit employees to do the August–October work (even if the work orders had been utilized). Donahue testified that he compensated for this factor by also assigning ''points'' for what he thought it would cost for the contractor to do the work on a per-task, or per-foot basis, again invoking on his knowledge of the industry. Then he compared points to arrive at his conclusions in his January 14, 1991, memorandum to Doyle.

It was further brought out on Donahue's cross-examination that the menu pricing of the Adderly contract covered only one area of unit work, splicing. Donahue was asked at what rates Adderly was to do the other work that had been done by the unit employees;[42] Donahue answered:

> I honestly can't answer that because I was not involved in the negotiations that occurred afterwards to see how that contract was set up, how they're—how they're billing for their maintenance activity, but in my judgment at the time, because I didn't have the information, I defaulted to the hourly rates.

Because the Adderly contract was not based on ''hourly rates,'' and because Donahue did not know how many hours were actually involved in the summary descriptions,[43] just what ''hourly rates'' that Donahue was referring to is impossible to discern.

Finally on cross-examination of Donahue, it was further established that, as well as including the construction technicians in the August–October costs of operating the construction department, Donahue also included Respondent's costs of employing alleged discriminatee Lynetta Bennett. Bennett's wages during the period were $6,724.91.[44] Donahue's January 14, 1991 report also recited that the construction department's ''in-house benefits'' were $8048;[45] Bennett's portion of that, one-seventh,[46] would have been $1,149.71.

Bennett was, as noted, a bench technician during the August–October 1990 period. According to Respondent's testimony, the bench technician job was a job that was more of a plant clerical nature; the bench technician had nothing to do with the operation of the construction department, except to send and receive electrical appliances that the employees in that department used or installed. Donahue testified that he knew all of the construction technicians and that ''I'm surprised that I included Lynette Bennett'' in his January 14, 1991 report to Doyle about the costs of operating the construction department.

Donahue was asked about the impact of counting Bennett as part of the construction department in his January 14, 1991 memorandum to Doyle:

> Q. [By Mr. Brainard, for the Union] Yeah. She didn't do any of the work that this contract [sic], in house survey was to analyze. Is that correct?
>
> A. That's correct.
>
> Q. So, in effect, it's an improper analysis of what the actual costs of in house, versus outside contracting, would have cost Comcast. Isn't that correct?
>
> A. I was—it was believed to be correct at the time.
>
> Q. It was believed to be correct at the time and certain assumptions were made, based on this document. Isn't that correct?
>
> A. I—that's correct.
>
> Q. I.e., the elimination of the entire construction staff. Isn't that correct?
>
> A. Uh-huh. That's correct.

On redirect examination, Donahue denied that he had intended to create an incorrect analysis or that he had any pre-

[42] See the description by Richard Gardner, above.

[43] Many of the projects could have had special problems.

[44] See R. Exh. 83(g).

[45] See R. Exhs. 83(a) and (g).

[46] It would have been one-eighth if all construction department employees, and Bennett, had been included; however, Donahue, with apparent care, excluded from his computations the quality control person who was not being laid off.

determined result in mind when he submitted the January 14, 1991 recommendation to Doyle.

Doyle testified that he received Donahue's January 14 memorandum on that date. He was asked on direct examination if he discussed ''the detail'' of Donahue's report. Doyle replied:

> I merely had a discussion confirming his results, and asked him if he was 100% sure of the conclusions that he drew forth in the memo. And he said he was.

Doyle testified that he gave Donahue's January 14 memorandum to Conner and:

> I told Mr. Conner I wanted him to review it, take the document home and use that as a tool for how he wanted to bring Philadelphia into an . . . operational business.

Conner did not testify to any such instruction by Doyle; Conner did not, in his testimony, say when he received the January 14, 1991 Donahue analysis.

Doyle identified a scathing memorandum to Conner dated January 18, 1991. The memorandum criticizes negatively the performance of the Philadelphia area operation. Doyle states, inter alia, that a named marketing manager ''is not appropriate for that position,'' and Doyle lists 14 ''specific directives'' which include:

> 3. Redo your organizational chart to reflect one employee per every 550 to 600 subscribers.
>
> . . . .
>
> 6. Take an immediate and hard look at the productivity of in-house employees. It is not just quantity of jobs that is important, but the completion of the work in a proper manner.
>
> . . . .
>
> 8. Take a close look at contract labor and keep to the stated plan with jobs performed.

Neither the construction department nor the installation department is mentioned by name.

On January 25, 1991, Conner sent Doyle a memo which states:

> As we are now in the first quarter of '91 and operating under the new budget guidelines, I [thought] it appropriate to give you an update regarding the business issues raised in your November 19, 1990 memo.
>
> Your memo appropriately points out that we are making the transition from a high growth business to a more mature system, and that this transition requires a broad review of [expense-saving] opportunities.
>
> Our status in that review is as follows:

Conner then states what he was doing, including reviewing how many customer service representatives can be eliminated. Conner further states that he plans a reduction of direct sales personnel to 24 (from an unstated number); and he plans ''elimination of at least one position'' in the local origination department. Conner concludes:

> As you know, the analysis of our cost for in-house versus contract labor in the installation, service and construction areas are at various stages of completion.
>
> It is my intention to not only proceed in achieving the reductions and economies previously outlined, but to also seek out any additional such opportunities that will allow us to operate more in keeping with our new status as an operating slower growth cable system. My expectation is that much but not all of the change in head count can be achieved through attrition.

Conner did not mention Doyle's January 18 memorandum, nor did he mention the construction technicians.[47]

After identifying Conner's January 25 memorandum, Doyle testified that he went to see Conner, on some unspecified date:

> Because the [Donahue] analysis was not at various stages of completion. Mr. Conner and I had discussed that in my mind, it was completed. . . . And we had a discussion and made a commitment to each other about what action was going to take place in the construction and the installation area. . . . The commitment was—is that the construction group would be laid off. And the other commitment was that installation would eventually be eliminated through attrition. . . .
>
> We discussed that and it was decided that installation, number one, is an entry level position, and the turnover in the department was such that over time, through attrition, that this department would be greatly reduced.
>
> Secondly, the analysis showed that there wasn't enough work in the construction arena to support that staff, while in the installation area, there was enough work to support installers.

Conner did not testify about this meeting with Doyle.

On February 6, Doyle sent Conner a memorandum entitled ''Priority Action Items'' stating:

> The attached list is an outline of some of the priority action items that you and I will be talking about over the next several months. I have put these items together so that we can have a list of areas that are mutually important. You should feel free to add or delete from these items. Please keep in mind that these items will change periodically as we resolve some of the issues.
>
> Most of these will be self explanatory. Don't panic if some of them are not. They are meant as an outline for our future discussions.
>
> Why don't you review these and give me a call when you feel comfortable about discussing these issues?

Doyle then lists 14 items which are most cryptically stated, including: ''Item 1—Staff Changes . . . Item 2—In house Installation . . . Item 3—Rate increase,'' etc. Doyle testified that, by the reference to ''Staff Changes'':

> What I meant is that Mr. Conner and I had reached our decision on the construction and installation area, and now it was time to move with the same sense of

[47] This memorandum is further fortification of my conclusion that the construction technicians were in the ''new budget guidelines'' for 1991.

urgency in all the other areas, using Mr. Donahue's document as the guideline.

Doyle did not testify that he ever told Conner of this meaning; Conner was not asked about the memorandum.

At the conclusion of the direct examination on this issue, Doyle testified that neither the Teamsters nor any employee involved in activities on its behalf was mentioned during the conferences that resulted in the elimination of the construction department and the layoff of the construction technicians.

On direct examination Conner was asked, and he testified:

Q. Did you make the decision about the lay off of [the] construction techs?

A. Let's say I shared in making the decision about the layoff of the construction techs, yes.

. . . .

Q. On what was that decision based?

A. It was based on the analysis that Mike Doyle had requested from John Donahue, and that John came forward with that analysis. I perused it, [and I] found it very interesting in the sense that there obviously was not sufficient work to justify keeping the construction group on board, and, given some of the problems we were going through with our own [profit and loss statements] in Philadelphia, I thought it was the appropriate business decision to make.

Referring to the statement in his January 25 memorandum to Doyle that ''the analysis of our cost for in-house versus contract labor in the installation, service and construction areas are at various stages of completion,'' Conner was asked and he testified:

Q. Would you read that paragraph to yourself, and explain what you meant in that paragraph.

[Witness reading document.]

A. Well, what I was really getting at in this note that I sent to Mike Doyle was that a number of things had already taken place, but with regard to the analysis that I referred to in that next-to-last paragraph I wasn't sure we were quite there, because there was something that I hadn't done that I needed for my own comfort level.

Q. What did you need to do?

A. Well, I wanted to talk to Paul Gillert.

Q. Why did you want to talk to Paul Gillert?

A. Because, quite frankly, in spite of the fact that I thought John had done a wonderful analysis and made a great deal of sense, and made sense from a business standpoint, I wanted the comfort of having talked to Paul about the changes that were outlined in those memos, including the construction tech lay off.

Q. In what respect did you have special concerns that you needed to talk to Mr. Gillert?

A. Primarily, because of the fact that the group had been thought of as being very, very pro union.

Q. What did Mr. Gillert tell you?

A. Mr. Gillert's response was if you have sound business reasons and you believe it is in the best interest of your business, and you don't have adequate work to do for them, do what you have to do.

Q. Following that conversation did you make a decision?

A. Yes.

Q. And that decision again was what?

A. As far as I was concerned at that point we should go ahead and proceed with the lay off.

Conner was not asked when he spoke to Gillert. Gillert did not testify on the issue.

Conner acknowledged that, before the autumn of 1990, he had heard no suggestion that the construction technicians might be eliminated.

Doyle testified that Conner told him that by the ''various stages of completion'' Conner was referring to needed discussions with Gillert; Doyle did not testify that Conner said what the discussions with Gillert would be about. In fact, as noted, Doyle denied that the union sympathies of the employees involved were discussed during the deliberations over their layoffs.

Cicatello testified that, after the February 8, 1991 layoff of the construction technicians, contractor Adderly and the line technicians did the work of the construction technicians. Cicatello testified that he negotiated the contract for such work with Adderly in November or December 1990 and the contract was effective January 1, 1991. When asked how much of the construction technician work was contracted out during 1991, Cicatello replied, ''I would say the majority of the work.''[48]

Through Rawls, Respondent introduced a listing of service calls that construction technicians did in the 2-week period, January 16 through February 1, 1991; there were a total of 283 such calls among the 6 construction technicians. Rawls testified that they were done by one construction technician per job; however, Rawls was not their supervisor, and Funchness credibly testified that the construction technicians worked in teams of two when doing service calls.

Tucker, the immediate supervisor of the construction technicians at the time that they were terminated, testified that during the autumn of 1990, there was little for the construction technicians to do. At the request of the Lower Merion manager, he sent some construction technicians there to help in various projects. He testified that he could do this because ''I was trying to find things for them to do.'' Tucker acknowledged on cross-examination that he had no foreknowledge of the layoff of the construction technicians. (And Tucker was on vacation when it happened.)

Through Doyle, Respondent introduced a summary that shows that, during 1991, 51 positions,[49] unit and nonunit, were eliminated. The listed unit positions eliminated include 24 installers, as well as the 6 construction technicians. The exhibit reflects that, of the nonunit positions eliminated in 1991, 14 were customer service representatives. On cross-ex-

[48] Respondent offered certain summaries of how much construction technician work was performed before and after the layoff. On objection, I rejected the summaries; neither Cicatello nor Donahue, through whom Respondent offered the summaries, had examined the supporting documents, and they could not swear to the accuracy of the summary; moreover, Cicatello acknowledged that certain hand written (as opposed to computer-generated) work orders were not included in the summaries.

[49] Respondent's brief states the figure at 81; the ''Total Reductions'' line is partially obliterated, but the column adds up to 51.

amination, Doyle was asked about the summary which is entitled, ''Job Elimination: 1991'':

> Q. And if you look, it looks like only a total of 14 CSRs were laid off; is that correct?
>
> A. That is correct. Well, the word laid off is wrong, there was a staff reduction.
>
> Q. Okay, by either attrition or—
>
> A. Right, there was a staff reduction of 14 customer service representatives.

Because the ''Job Elimination'' plan to which Doyle referred therefore included reductions by attrition, there is no probative evidence that anyone but the construction technicians and Bennett were laid off in 1991.

(b) *Prior announcements*

Respondent introduced evidence that the employees, in fact, knew of an impending layoff and the reasons for it.

Gillert testified that during a 1988 organizational campaign by the IBEW, he conducted a meeting with employees to present Respondent's position. He was asked, and he testified:

> Q. Were any of the individuals, who were amongst the group of construction techs who were laid off from the company in 1991, in that meeting?
>
> A. I recall there were, to the best of my recollection, pretty close to 100% attendance of the bargaining unit in totality, and there were, to the best of my recollection—recollection, almost all, if not all of the construction techs there. Mr. Dennis Coleman, who was a construction tech at that time, Mr. Vanderhauf (phonetic). I—I recall seeing someone who was identified as Carmen Favano was there, both Gardners were there. . . .
>
> Q. During that meeting, did the subject of construction tech work come up?
>
> A. It did. . . . Mr. Coleman, I recall, asked ''What's going to happen to construction techs,'' and I told Mr. Coleman, ''As you have all been told in the construction department, we're projecting construction to be completed sometime within the net year to 18 months, to probably no longer than two years, and when that happens, it means you'll be laid off.'' . . . I strongly recommend[ed] that all of them begin taking vocational courses to pursue internal opportunities into the technical jobs. I told them that while—when there's a lot of construction activity, they might very well do well as an employee or leave the employ of the company and work for contractors, but that meant they would have to move from location to location, benefits might not be the same or as good as at Comcast, and I said, ''When there's a lot of construction with contractors, you can make good money, but it does involve relocation, et cetera, and if you want to settle down and stay in this area, it would behoove you to take technical courses,'' because I told them I thought that was where the future employment possibilities were.

Doyle testified that in mid-November 1989 he met separately with the engineering employees who were to be laid off and with the seven who were being retained.[50] Doyle testified that in the meeting with the seven who were being retained:

> The first thing we talked about was what happened to their—the other construction people. So they were advised about that, and then that group of seven were told that they do have a job.
>
> The question was asked of me during the meeting: Are these jobs secure? Are they permanent? And I remember my response very vividly because I knew that the nature of those jobs was not secure. And so my answer to the people at that time was: The only thing that I can tell you is that you are in 1990's—1990's budget.

Doyle told the seven retained employees nothing about 1991 or the budget for that year.

Conner testified that, in January 1991:

> Marshall [Stevenson] approached me again, and this was down at the Wayne Avenue location, and he had a very worried look on his face, and he simply pointed out that they had not been getting a lot of the normal work that would go out to a construction tech, in fact, he had been doing, I believe, some service calls at that point, I don't know how many. He said, you know, what's going on. My response was that he was right, there wasn't a lot of construction activity, things to some degree had been winding down, and that was pretty much it.
>
> I did point out to him that if he had concerns beyond that he needed to talk to Will Kelly or he needed to do whatever he felt was appropriate.

Kelly testified that on the very morning of the February 8 layoff, Stevenson asked that, if the construction technicians were to be laid off, they get at least a week's notice.

Stevenson disclaimed memory of these exchanges with Conner and Kelly; I do not believe Stevenson. At the same time, the exchanges show that Respondent was not telling the construction technicians that it had under serious consideration during January the elimination of the construction department. It was withholding the information until the implementation of the layoff. For this reason, I cannot believe Gillert's testimony that, as early as 1988, he gave the construction technicians a categorical warning that their jobs were to be eliminated. Richard Gardner was the only construction technician who was present in 1989;[51] on cross-examination, he was asked if he remembered such statements by Gillert; he testified that he did not; he testified that he would have gone looking for another job if Gillert had made any such statements. I accept this statement by Gardner as credible testimony that, if anything like that had been said by Gillert, Gardner would have remembered it. Moreover, Doyle's ambiguous 1989 response (that he could tell the employees no more than that they were in the budget for 1990) fortifies my conclusion that neither Gillert, nor any other of

[50] Doyle testified that he announced the 1989 layoff himself because Philadelphia Area Vice President Hipple had left and, as mentioned above, Doyle acted in that position until Conner was employed in April 1990.

[51] Steven Gardner was a service technician at the time.

Respondent's principals, would have given the construction technicians a clear warning of their impending terminations.[52]

w. *Interrogation of Jett by Rawls*

Paragraph 8(d) of the complaint alleges that Respondent, by Rawls, in violation of Section 8(a)(1): ''About late December 1991 or early January 1992, interrogated an employee concerning the employee's Union sympathies.'' In support of this allegation, the General Counsel called current employee Dondell Jett who testified that in December 1991, at a time when he was in Rawls' office, Rawls asked him what he thought of the Union. Jett testified that he replied to Rawls, ''At one point I thought we needed a Union here at Comcast.'' Jett testified that there was no more to the exchange. Jett did not remember why he had been in Rawls' office; he goes there regularly because he is a lead service technician.

On direct examination, Rawls was asked, and he testified:

> Q. And what were the circumstances of that conversation and what did you say to him?
>
> A. Well, I had asked Dondell to come into my office, and the reason for why the word union came up was because I had asked Dondell to just keep his ear to the ground, make sure that—that there were no interference in our, you know, daily operation.
>
> Q. What was going on at the company at the time?
>
> A. At that time, it was like late December, there were a—a lot of leaflet materials from Local 115 Teamsters being passed out. Also, it was a couple of weeks before the hearing were to—to begin, so people were kind of, you know, in a state of disarray. So, that was the reason I had asked Dondell as I did, and also with my weekly staff meetings, you know, I always asked my supervisors and my leads to make sure they let us know of anything that might cause a interruption in the daily operations.
>
> Q. Did you ask Dondell Jett how he felt about the union?
>
> A. No, I didn't.

Also, on cross-examination Rawls testified:

> Q. And if you could, tell us what was said in this conversation, as best you can?
>
> A. What was stated in the conversation or what I actually said to Dondell in the conversation was that, you know, I just needed him to, you know, keep his ear to the ground to let me know of—of—of anything that might be going on that would cause a interruption in—in the—in the operation, because there were a lot of union activity going on.

Jett appeared credible and, to the extent Rawls' answers can be considered to be a denial of Jett's testimony, I discredit Rawls.

[52] Even if the warning by Gillert did occur, it was not repeated to any of those who transferred to construction afterwards, including Funchness, Stevenson, and Steven Gardner.

B. *Analysis and Conclusions*

1. Alleged 8(a)(1) violations

In this section of the decision, I address those 8(a)(1) allegations for which I am not recommending dismissal on the basis of credibility resolutions made above.

a. *Promises and grants of benefits*

(1) The May 28 wage increases

(a) *The announcement*

The complaint alleges that the May 10 announcement was an unlawful promise of benefit in violation of Section 8(a)(1). The Board has found violations where an announcement of a benefit is framed in such a way as to coerce employees in their selection of collective-bargaining representative, even if the grant is perfectly justified on all other accounts. If an otherwise justified conferral of a benefit is announced as a reward for rejecting a union,[53] or presented as a response to organizational activity,[54] a violation will be found.

By the May 2 letter from Conner, the employees were told that they ''do not need the Union to ensure . . . fair resolution of concerns or problems''; Conner adds that ''Union representation here can be financially costly and otherwise detrimental to you.'' Then, by the May 10 memorandum, the employees were told that they are to receive wage adjustments, presumably upwards, as part of an ''on-going effort,'' and, in the same memorandum, Respondent denies that is trying to influence the employees' votes.

The General Counsel contends that the May 2 and 10 messages must be read together, and that by doing so, the conclusion is compelled that Respondent was presenting the May 28 wage increases as a response to organizational activity. The General Counsel cites *J. J. Newberry Co.*, 249 NLRB 991 (1980), as authority for this argument.

I agree that the May 2 and 10 messages must be read together; this is what the employees would do. However, the two messages must further be read in the context of the previous year's announcement that wages would be reviewed ''at least annually.'' In *Newberry* the employer's first announcement that wage increases were being considered contained a strongly worded antiunion message including the statement that the employees did not need a union to secure such benefits. In this case, the Hipple presentation in 1989 was the first announcement that wages would be reviewed, and presumably raised, in 1990 and all other subsequent years. This announcement preceded the Teamsters organizational activity by many months. That being the case, in May 1990, the employees would not reasonably have concluded, solely from reading the messages, that the forthcoming wage adjustments (of unspecified size) were coming in response to the organizational effort.

Ultimately I find here that the May 28 increases were violative because of their amounts; however, without more,[55] I

[53] *Topeka Discount*, 181 NLRB 17 (1970).

[54] *Hamilton Avnet Electronics*, 240 NLRB 781 (1979).

[55] Perhaps there would be a different result if the messages of May 2 and 10 had, somehow, forecast exceptionally large wage increases; however, strictly read, the messages promise no increases at all.

cannot conclude that the announcement of May 10, even read together with the May 2 letter, constituted a promise of unprecedented increases. In this posture of the case, it cannot be said that the May letters from Conner contained a violative promise of benefits, and that is the allegation of the complaint.

Accordingly, I shall recommend dismissal of paragraph 7(d) of the complaint.

(b) *The grant of the May 28 wage increases*

In regard to the increases themselves, the General Counsel contends that they were timed to interfere with the August 10 election; the General Counsel additionally contends that, even if some increases were expected at the time, the amounts of the May 28 increases were so great that the employees could only have concluded that they were given in order to dissuade them from voting for the Union.

In *ARA Food Services*, 285 NLRB 221, 222 (1987), the Board stated the ''well-established principle'':

> [W]hen a benefit is granted during the critical period before an election, the burden of showing that the timing was governed by factors other than the pendency of the election is on the party who granted the benefit. The logic behind this legal principle is clear: only the party granting the benefit can explain why it chose to do so. An employer meets that burden if it presents evidence which establishes justification for its action.

I find that Respondent has satisfied the burden of showing that some increases were expected by the employees about the time that the May 28 increases were given. The Hipple presentation of 1989 told the employees that wage reviews would be made annually, and that, ''if appropriate, ranges will be adjusted.'' Having heard (and read) that, no employee would have left the presentation without the expectation that some wage increases would thereafter be given annually; employees, correctly or incorrectly, would always think some sort of wage increase was ''appropriate.'' True, the question of appropriateness was a qualification that would have left the Respondent some sort of defense if the matter were the subject of a breach of contract action, as the General Counsel, in effect, argues. But the employees would not be thinking that way. They would certainly be expecting wage increases in the year following the Hipple presentation, and that expectation would have been so logical that Respondent could well have violated Section 8(a)(1) had it granted no increases at all.[56]

Accordingly, I reject the General Counsel's contention that the May 28 wage increase violated Section 8(a)(1) by its timing, alone.

However, although I have found that increases to some employees were undoubtedly expected at the time, the amounts of the May 28 increases raise separate considerations.

In *Exchange Parts Co*., 375 U.S. 405 (1964), the Supreme Court, with dramatic imagery, described the potential evil of the use of grants of wage increases (or other benefits) during an organizational campaign:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. [Footnote omitted.]

Exchange Parts, of course, is no license for employers to use amounts, rather than timing, to accomplish the same, undesirable, end. Whether the amounts of the increases were manipulated to affect the results of the August 10 election is the issue here. If so, a violation of Section 8(a)(1) is established, even if some wage increases had been called for at the time. This is because an employer is obliged to carry out his wage-setting practices during a union campaign in the same manner it would have done in the absence of the campaign. *McCormick Longmeadow Stone Co*., 158 NLRB 1237, 1243 (1966). Manipulating amounts of otherwise-scheduled wage increases has an unlawfully coercive impact, even where the increases are as little as 2 percent of base wages.[57] The issue under *Exchange Parts*, supra, is whether the grant had the purpose, or necessary effect, of discouraging support for a union. *Knogo Corp*., 262 NLRB 1346 (1982), enfd. in relevant part 727 F.2d 55 (2d Cir. 1984).

In the first year of the Respondent's wage and salary program, 1989, it called for less than 5 percent for many employees. Eventually all of the employees received 5 percent, but only because Hipple mistakenly told them that they would get 5 percent.

In 1990, the second year of the program, the employees in the most populous unit positions received double or triple what they received in 1989. The unit employees received 5.1 percent (or less) in 1989, but, in 1989, the most populous unit classifications received better than double or triple that percentage; line technicians and construction technicians received 11.60 and 14.8 percent, respectively; and the service technicians, the most populous unit classification, received 15.5 percent. And all of this was not just double or triple what the program called for; all of that was double or triple what they received in 1989 because of Hipple's mistake. What the employees in the most populous unit classifications received in 1990 was therefore *greater* than double or triple what Respondent's program called for in 1989.

However, in 1990, the increases for the most populous nonunit classifications were not as great. Comparing the wage increases by percentages, the most populous nonunit classification, customer service representatives, did not get 200 or 300-percent greater wage increases than they received in 1989. They received 30.3-percent greater increases than they did in 1989; and dispatchers received 40.0-percent greater increases. Moreover, clerks received 61.8-percent *smaller* increases than they did in 1989. Presumably, if Friday's computations had any consistency, the voting and nonvoting classifications would have fared equally well. This is

[56] The only case cited by the General Counsel as authority for the finding of a violation in Respondent's timing of increases in May is *Elston Electronics Corp*., 292 NLRB 510 (1989), where the employer had no established policy on wage increases and had given the employees no reason to expect wage increases at the time that they received them.

[57] *Scott Glass*, 261 NLRB 906 (1982).

especially true in regard to upgrades; the unit employees received several; the nonunit employees received none.

Doyle and Friday almost had their stories straight; however, Doyle testified that he told Friday that the entire wage program had to be scrapped because the employees were so dissatisfied with it; Friday explained Doyle's 1990 personal intervention into the process of establishing wages by testifying that the program had to be initiated each year by someone at Doyle's level of responsibility. (And that testimony was belied by the Hipple presentation that stated that the program would be conducted ''at least annually.'') Also, Doyle testified that Friday presented her December 1989 recommendations with a statement that an overall 4-percent wage increase was included. But Friday testified that her December recommendations included many upgrades, and that she verbally recommended an overall 4-percent increase on top of those during the December meeting, and the records prove that that is what happened. I do not believe that Doyle would have made such a mistake if increases were the product of the procedures that he described, or any honest procedure.

Friday testified that, in 1989, ''the structure'' was increased by 14 percent; however, the employees got increases of only 5 percent (or less) pursuant to the program. Friday's testimony demonstrates the plasticity of both the program and the testimony. The program, especially as interpreted by Friday, could produce any result desired.

Any doubt that the 1990 unit increases were the product of manipulation toward a preestablished end is removed by a reading of Friday's testimony and further scrutiny of the figures displayed above. The constituents of the 1990 increases were said by Friday to have been increased by several factors, all of which would have caused similar increases in 1989 when the program actually called for *less* than 5 percent for many of the employees. The ''4%'' factor was for a ''passage of time''; just as much time had elapsed since 1988 before the comparatively small grants of 1989. Friday testified that she increased the percentages of the CTAM standards to raise the maximums and minimums ranges; there is no suggested reason the raising of the ranges would not have occurred in 1989. Also, the CTAM standards, themselves, were augmented by another 8 percent because of, again, Friday's concept of the ''passage of time'' and the fact of the high wage rate Philadelphia labor market; again these factors existed the year before, and the employees netted 5-percent increases, or less, under the program. The new employees' 6-month review is something that existed in California before; if the ''overwhelming'' turnover described by Doyle was something new, there is no evidence of it here. Finally, Friday's statement that she upgraded classifications and, therefore, additional increases were called for, is nothing but a self-evident proposition. Certainly, Friday testified to no consultations with the supervisors of the employees involved, or any consensus that might have evolved from such consultations. It is evident that Friday consulted with no one in making her recommendations to Doyle, and she did it, apparently, without leaving her office in downtown Philadelphia, or even telephoning persons with first-hand (or second-hand) knowledge of what the employees were actually doing. Even at the May 22 meeting, as Respondent's witnesses admit, only the amounts received by the customer service representatives were discussed before adjournment (because of the news that the Teamsters' petition had been filed).

In addition to the supervisors' having no part in upgrade decisions, they had no part in setting individual wage increases. Except for the classification of converter prep technician, supervisory input played no part in the raises, according to Respondent's Exhibit 63. It is absolutely incredible that the other 80-odd unit employees had neither positive nor negative recommendations from their supervisors. The essential absence of supervisory input demonstrates that the unit wage increases were determined by consideration of matters that were completely divorced from merit. It is further reasonable to conclude, as I do, that, if Respondent was not employing considerations of fairness to individuals (on the basis of merit), it was not employing considerations of fairness to the group (on the basis of the factors concocted by Friday, obviously at the instructions of Doyle). Finally on this point, it is to be noted that Friday did not testify to any mention of concern by Doyle (or anyone else) about what the total cost of the double and triple percentage wage increases would cost, which necessarily was in the hundreds of thousands of dollars, just for the first year; compare Respondent's professed necessity to save $4100 per quarter by firing all of the construction technicians.

That Friday's recommendations were not the product of experience, legitimate inquiry, or corporate need, is specifically demonstrated by the treatment of the two classifications that were ostensibly terminated for lack of value to the organization, bench technician and construction technician; the employees in those classifications received wage increases of 17.4 and 14.8 percent, respectively.[58]

That is, the 1990 wage increases were larded with make-weight factors, even though, according to Friday on cross-examination, wage increases are usually less after the year that such wage-review programs are introduced. The next question is: why?

Respondent knew of the Teamsters' organizational campaign at least by November 15 when Calhoun sent his memorandum to all employees.

Doyle testified that in August 1989, he noted ''very evident'' factors which prompted his instructions to Gillert and Friday that culminated in the May 28, 1990 increases. If there had been any truth to this testimony (and Friday's corroboration of it), it would not have taken until October to get to the employees the balance of the 5 percent promised by Hipple in May 1989. (Whoever did not get 5 percent in May 1989 could have been granted the difference with comparatively unsophisticated processes, immediately.)

I believe that nothing was done toward calculating the amount of the 1990 wage increases until after the Calhoun memorandum of November 15, and I so find. Then the putative justifications for the amounts were concocted by Doyle, Friday, and (possibly) Gillert.[59]

Particularly incredible is Doyle's testimony of ''overwhelming'' turnover which necessitated part of the May 28

[58] Moreover, as noted, Bennett was not even doing the bench technician work at the time of the June increases; moreover, Conner testified Cicatello said of the bench technician job, ''he really didn't need it, it proved not to be a full-time job.''

[59] That other employees in other places derivatively benefited is no defense here; the number of unit employees was much greater, and it was the tail, not the dog, that was being wagged.

increases. The claim was unsupported, and Doyle was unimpressive in making it.[60] Moreover, the greatest turnover mentioned during the hearing was that in the position of customer service representative; the nonunit employees in that classification received some of the smallest increases, and they were among the first to be scheduled for attrition in 1991; turnover in that classification could not have been much of a concern. Moreover, the chart presented by Hipple in 1989 showed that almost all of Respondent's employees were receiving wages that were equal to, or greater than, those being paid by Respondent's competitor (for labor) and better than the CTAM standards. (The only exception was the rate for service technicians who were at the minimum rate for that classification. However, Doyle testified that the entry-level positions of (nonunit) customer service representatives and (unit) installers were the positions most subject to turnover, not service technicians. And the customer service representatives and installers were shown by Hipple's presentation to be doing better at Comcast than at ''Company A'' or in the CTAM survey.)

Therefore, assuming some truthfulness to Doyle's claim that turnover was a problem, wages were not the cause; at least, wages were not the cause to the extent that would have justified increases to the *unit* employees that were 200 and 300 percent greater than the percentage increases of 1989.

I find that Respondent has failed to meet its burden of proving that the extraordinary amounts of the 1990 unit wage increases were determined by factors other than the pending election, and I conclude that the extraordinary size of the increases would foreseeably have affected the results of the May 10 election.[61] Moreover, because Respondent adduced no evidence to support the alleged reason for the acceleration of the wage reviews for new employees (''overwhelming'' turnover or anything else), I specifically conclude that the acceleration of those reviews, during the pendency of the election, violated Section 8(a)(1).[62]

Moreover, even if Respondent's 1990 computations were legitimately infused with the elements cited by Friday and Doyle, Respondent did nothing to disabuse the employees of the ineluctable impression that the source of Respondent's 1990 comparative largess was nothing other than the pending Board election. The 1989 increases (especially before Hipple's mistake) were comparatively niggardly: 5.0 percent (or less) in 1989 contrasted to better than double or triple that in 1990. According to this record, Respondent made no attempt to explain to the employees why the 1990 increases were so much greater than those of 1989.[63] The reference in the May 10 memorandum to Respondent's ''on-going efforts'' would hardly have served to explain the difference; the employees knew that the year's previous ''on-going effort'' had gotten them only 5 percent, and they received that comparatively small amount only after the complaints based on Hipple's (mistaken) promise. Without any other explanation, even the fictional ones that were advanced at trial, the employees would necessarily be left with the impression that the difference was caused by the only manifest difference in the 2 years, the Teamsters' campaign.

In summary, I find and conclude that by telling the employees that they did not need a union, and then, by almost immediately granting to the unit employees the extraordinary increases of May 28, without offering any explanation of how those increases were determined, Respondent engaged in actions that had the obvious effect of leading the employees to believe that the amounts of the increases were determined, at least in part, in response to the union activity. By such conduct, Respondent necessarily violated Section 8(a)(1), as I find and conclude.[64]

(2) Direct deposit announcement

On August 3, or exactly 1 week before the August 10 election, Conner sent the employees a memorandum telling that, on September 28, they could have their payroll checks deposited directly to their banks. As the benefit could not be made effective for nearly 2 months after the announcement, there is no explanation for the August 3 announcement other than the election that was scheduled in 7 days. A better example of a ''well-timed' increase,'' under *Exchange Parts Co.*, supra, can hardly be imagined.

Conner and Gillert offered testimony to that effect that there had been some sort of mistake in the fact that the direct deposit benefit had not been previously put in place; Gillert suggested that subordinates had just not gotten around to it before the Teamsters' activity. Conner stated that Gillert was ''a little shocked''; and Gillert testified (twice) that he was ''shocked'' to hear that the unit employees did not have the direct deposit benefit. This duplication appears to be the product of over-rehearsal, and I do not credit the testimony of either man on the issue. Gillert was chief of personnel; presumably he knew what the employment benefits were.[65]

To explain why the announcement of direct deposit was made just 1 week before the election, Conner and Gillert also testified that Respondent's staff was slow to act.[66] However, Respondent offered no substantiation of the testimony that earlier instructions had been given to implement the program, and, if there had been any truth to the assertions by Gillert and Conner, it assuredly would have done so.

In *R. Dakin & Co.*, 284 NLRB 98 (1987), the employer, just before a Board election, and after employee complaints, changed pay schedules from biweekly to weekly. The employer defended the timing of the announcement of the benefit on unsubstantiated failures of subordinates to carry out preunion activity orders. The Board found a violation of Section 8(a)(1) stating that there was no probative evidence from which it could be concluded ''that the Respondent would have changed the payroll system absent the union organizing campaign.'' Similarly, there is no probative evidence that previously expressed wishes of the employees for direct deposit would have been granted absent the Teamsters' campaign here.

[60] See *Knogo Corp.*, supra, in which the Board rejected such a ''turnover'' justification for wage increases because of a failure to introduce supporting documentation.

[61] *Big Star No. 185*, 258 NLRB 300 (1981).

[62] *Knogo Corp.*, supra.

[63] Conner's May 10 letter said that the supervisors would be meeting with the employees, but that statement is not evidence that they did so; even if they did, there is no evidence of what was discussed.

[64] See *Century Moving & Storage*, 251 NLRB 671 (1980), and cases cited there.

[65] And I consider Lawyer Gillert's testimony that he ''did not perceive it as a benefit'' to have been an insult to the forum.

[66] As Conner put it, ''things dragged a bit.''

Respondent contends that the matter is de minimis; it cites one case where an employer passed out free beer before an election and another case where the employer announced that its cafeteria would be opened 15 minutes before each shift. Although all such benefits cannot be accurately quantified for purposes of comparison, it is safe to say that the benefit granted here would be significantly more valuable to employees. With direct deposit, the employees save the time and expense that it takes to get their paychecks to the bank. Moreover, the security afforded the employees must be of great value in these times of ever-rising crime rates.[67] Finally, the grant here (as opposed to the facts in the cases cited by Respondent) was in the nature of a satisfaction of a grievance; the employees complained to Conner, and they got results; and they got the results just before the August 10 election. That factor could not have been lost on the employees who were to decide on whether they needed an collective-bargaining agent to get such results after the election.

I find and conclude that by its August 3 announcement of a new direct deposit program, Respondent violated Section 8(a)(1) of the Act.

(3) Conner's promise of a work boot benefit

I have found that in June or July, Conner reported to the employees that Respondent ''wanted'' to implement a work boot policy but could not do so while the election was pending. The obvious inference is that Respondent would do what it ''wanted'' after the election. This was a promise of future benefits that was made in response to an employee's complaint or grievance.

Respondent cites *Village Thrift Store*, 272 NLRB 572, 572–573 (1983), for the proposition that an employer may lawfully tell employees that it is withholding benefits because it wishes to avoid a charge of interference with a pending Board election. That case, however, was the narrow instance where the employer had a ''haphazard'' history of granting wage increases; the Board found that, in such cases:

> [T]he employer is faced with a Hobson's choice of granting the benefit with no objective evidence available to explain the timing, thereby risking allegations of unlawful interference with employees Section 7 rights or, as Respondent chose here, withholding the benefits and still being subject to charges of unlawful conduct. The Board has resolved this dilemma by permitting employers to tell their employees that those benefits previously provided in an indefinite manner will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference. [Footnote omitted.]

Village Thrift has been extended to insulate from unfair labor practice charges employer statements to employees that regularly scheduled benefits are being withheld solely in order to avoid such charges.

However, the rationale of *Village Thrift* has never been extended to claims that an employer is withholding benefits which are not currently expected by the employees. If it were, employers could list with impunity any number of new benefits that it would grant, but for the pendency of a Board petition. The employees here were not expecting work boots. Conner's statement that Respondent ''wanted'' to grant a work boot benefit, but could not because of the Board proceedings, was simply a promise of a later grant; and it was a further demonstration to the employees of why, to quote Conner's May 2 letter, ''You do not need the [U]nion to ensure good communications and fair resolution of concerns or problems.''

In this context, Conner's statement was a promise of a benefit, in violation of Section 8(a)(1), as I find and conclude.

(4) Promise of promotion to Heath

I have credited Heath's testimony that Conner and Cicatello attempted to persuade him to apply for a lead position at Lower Merion; and the encouragement came after Conner asked Heath how he felt about the Union, and Heath replied strongly that he was for the Union.

The attempts by Conner and Cicatello were nothing short of a blatant attempt to get a strong union supporter out of the voting unit; certainly, there is no evidence that Respondent attempted to get any other unit employees to take the (nonunit) Lower Merion position.

This offer of a promotion in an attempt to dilute the Union's support, or silence a strong union supporter, was a violation of Section 8(a)(1) of the Act, as I find and conclude. See *Airborne Freight Corp*., 263 NLRB 1376 (1982), and cases cited infra.

b. *Interrogations*

I have indicated that I shall recommend dismissal of two of the allegations of violative interrogations on the basis of my credibility resolutions; these are the allegations that Cicatello interrogated Lawrence ''several times'' and that Conner asked Stevenson why he was not wearing a ''Vote No'' button. The remaining allegations raise issues of law.

The Board summarized the law in *Kellwood Co*., 299 NLRB 1026 (1990):

> The Board, in *Rossmore House*,[6] held that an interrogation of an open and active union supporter violates Section 8(a)(1) when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed by the Act. The Board also outlined factors that may be considered in applying this test: the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Subsequently, in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board held that the analysis set forth in *Rossmore House* applied to all interrogations, not only to those involving open and active union supporters, and that whether the employee involved was an open and active union supporter was a relevant factor to be considered in evaluating the total context of the interrogation.

[67] Also compare *R. Dakin & Co*., supra; the change of payday was of no measurable economic benefit.

[6] 269 NLRB 1176 (19[84]), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Both the General Counsel and Respondent cite these cases in support of their respective positions.

(1) Interrogation of Heath by Conner

I have found that Conner asked Heath how he felt about the Union at some point during the summer of 1990. Heath replied, in strong terms, about why he wanted the Union to represent him.

Heath testified that he wore a union button during the campaign, but, even if a violation is not made out by Conner's question, alone, under *Rossmore House* and *Sunnyvale Medical Center*, Conner and Cicatello used the result of the questioning as a basis for an unlawful offer of a promotion to Heath, as I conclude above. That is, the unlawful enticement was offered because of the response to the interrogation. Therefore, the element of coerciveness to the questioning, under *Rossmore House* and *Sunnyvale Medical Center*, was supplied by Conner and Cicatello. Accordingly, I conclude that, by the interrogation of Heath by Conner, Respondent violated Section 8(a)(1) of the Act.

(2) Interrogations of Bennett by Rawls and Donahue

I have found that in July Rawls and Donahue asked Bennett how she planned to vote in the election. Citing *Rossmore House* and *Sunnyvale Medical Center*, Respondent argues, in effect, that because Bennett wore a union button, the supervisors were privileged to ask this question. The cases do not license unrestrained interrogations of button wearers. Moreover, where the interrogation is related to other unfair labor practices, a coercive element established.[68]

This interrogation took place during a period shortly after Respondent, as I conclude above, had unlawfully granted extraordinarily large wage increases. The classification that received the largest wage increase, 17.4 percent, was the bench technician. The only person in the bench technician classification was Bennett.

Bennett's extraordinary increase, among all the extraordinary increases, could not have been granted because Bennett was such a valuable employee, if any credence is to be given to Respondent's theory of her discharge. It could only have been granted to sway Bennett's vote or her advocacy (that Green described as being mentioned in at least one of the Peddrick meetings). The conclusion is therefore compelled that the interrogations were attempts to find out what Respondent was getting for its money.

In this context, Rawls' questioning of Bennett violated Section 8(a)(1) of the Act, as I find and conclude.

(3) Interrogation of Heath by Cummings and Duncan

I have found that 2 weeks before the August 10 election, Cummings and Duncan stopped Heath in a hallway and asked him why he was wearing a union button. Again, an employee's wearing of a union button does not automatically license the questioning of the employee about why he is doing so; it especially does not license supervisors' ganging up on an employee to get their answer, as Cummings and Duncan did here.

The interrogation of Heath by Cummings and Duncan violated Section 8(a)(1) of the Act, as I find and conclude.

[68] *Clark Equipment Co.*, 278 NLRB 498, 502–503 (1986).

(4) Interrogation of Stevenson by Green

I have found that in July Green asked Stevenson why he thought he needed a union. Respondent cites *Churchill's Supermarkets*, 285 NLRB 138 (1987), as authority for the proposition that, because the conversation was friendly, Green was privileged to ask this question. *Churchill's Supermarkets* stands for no such proposition. In that case the supervisor and employee had an ongoing ''personal'' relationship, and the union was just one of many topics that the employee and the supervisor regularly discussed. There was no evidence of such a relationship between Green and Stevenson.

I find and conclude that by Green's interrogation of Stevenson, Respondent violated Section 8(a)(1) of the Act.

(5) Interrogation of Sweeney by Harris

I have found that in June or July Harris sounded out Sweeney by stating that he had heard that Sweeney had been ''working for the Union.'' Respondent contends that, because Harris and Sweeney were friends, there could have been no coercive element.

Sweeney answered Harris by telling him to mind his own business. Sweeney, on cross-examination, testified that he thought Harris ''was trying to get some information out of me.'' Both Sweeney's response to Harris, and his response to counsel, demonstrate that there was nothing ''friendly'' in the exchange. Friendships take different forms, and it is clear that this friendship did not include discussions about the union activities that were being conducted. The cases cited by Respondent are thus distinguishable.

I find and conclude that, by Harris' interrogation of Sweeney, Respondent violated Section 8(a)(1) of the Act.

(6) Interrogation of Jett by Rawls

Rawls admitted instructing Jett and other leadpersons to let him know if there were any union activities going on. As Jett is an employee, this was an admitted instruction to spy. But the only allegation of the complaint is that Rawls interrogated Jett, and I have credited the testimony in support of that allegation, and that will be the extent of the conclusion that I enter (even though I firmly believe that both violations occurred).

I find and conclude that, by Rawls' interrogation of Jett, Respondent violated Section 8(a)(1) of the Act.

(7) Interrogation of Stevenson by Conner

It is undisputed that, during the second alleged interrogation of Stevenson by Conner, Conner told Stevenson that he had heard that Stevenson had been ''strong-arming'' employees to vote for the Union, and he told Stevenson that both sides must ''play fair.'' In arguing that an interrogation was somehow created by this, the General Counsel states on brief, ''Conner's allegation of strong-arming clearly called for a response, and, under the circumstances constituted [a] coercive interrogation about Stevenson's union activity.'' To the extent that Conner could have been asking anything, he could have been asking only for a denial of ''strong-arming.'' No other response than a denial could have been expected, as Stevenson assuredly would have recognized. And a denial is all that Conner got.

Under the circumstances, I conclude that there was no violative questioning of Stevenson by Conner, and I shall recommend dismissal of the allegation.

(8) Interrogation of S. Gardner's group by Donahue

I have credited Steven Gardner's testimony that, about a week before the August 10 election, Donahue walked into a room where Gardner and three other employees were present and asked them what they thought about the Union. No one replied.

Although I have credited the testimony on which the interrogation allegation is based, I cannot conclude that there was some coercive element in Donahue's act. At most, Donahue was trying to get a conversation started with the group. Donahue was ignored, and that was the end of the matter. Any potentially coercive impact was necessarily diluted to the point of nonexistence by the group's rejection. (Of course, this instance is to be distinguished from the cases where supervisors, including Donahue, sounded out employees individually about their union sympathies.)

I shall recommend dismissal of this interrogation allegation of the complaint.

(9) Interrogations of, and threats to, Takach by Brandt and Davis

I have found that, at some point during the campaign, Brandt asked Takach if Takach thought, with a union, he would be able to keep his job if he lost his driver's license, just as he was then being allowed to keep his job because Respondent had arranged to have a trainee drive Takach during his then-forthcoming period of driver's license suspension. This was a purely polemical question, and it would have been interpreted as such by any reasonable employee. I reject the General Counsel's arguments that the statement was some sort of threat that Respondent might treat Takach otherwise if the Union were successful in the then forthcoming election (and there is no evidence that it did).

Whether Davis impliedly threatened Takach when she also asked about his driver's license status is a closer question. She, unlawfully I find, asked Takach if he supported the Union. Takach told her that was none of her business. Then, according to Takach, other matters were discussed; one thing that came up was Davis asking Takach when he would lose his license. Takach told Davis that was none of her business also. The connection between references to his union support and his driver's license was not immediate in Takach's testimony, and I shall not construct such a connection here. I shall recommend dismissal of the allegation that Davis threatened Takach.

However, Davis had no legitimate basis for the inquiry that she made of Takach. He was not an open union supporter, and he and Davis were not personal friends, at least according to this record; even if they were, this was not an entirely friendly conversation, as Takach's responses indicate.

I find and conclude that Respondent, by Davis, interrogated Takach in violation of Section 8(a)(1) of the Act.

c. *Prohibition of union buttons*

I have found that, in March, Donahue and Brandt instructed employees not to wear union buttons. Respondent acknowledges that it is unlawful to prohibit the wearing of union buttons unless there are physical requirements of the job that prevent the wearing of any buttons. Respondent contends, however that any instruction that was issued was effectively repudiated, citing *Raysel-Ide*, 284 NLRB 879 (1987).

In *Raysel-Ide*, one supervisor instructed one employee, outside the hearing of any other employee, not to wear a union button at work. Within 24 hours, the supervisor told the employee that she could wear the button. Specifically finding that the incident occurred ''in a context free from other unlawful conduct,'' the Board found that an effective repudiation had been accomplished within *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Respondent points to the testimony of former Supervisor Tucker that, after Donahue's instruction to the line technicians not to wear union buttons, another supervisor told some line technicians that it was all right to do so.

Even if all of the employees in Donahue's meeting were at the meeting to which Tucker referred (a problematical proposition), there were more employees involved, and there was more time involved, than in *Raysel-Ide*. Moreover, the context in which the violation occurred is hardly ''free from other unlawful conduct.''

I find and conclude that, by Donahue's and Brandt's instructions not to wear union buttons, Respondent violated Section 8(a)(1) of the Act, and I conclude that Respondent's action in this regard has not been effectively repudiated.

d. *''Troublemakers'' statement to Bennett by Rawls*

I have credited Bennett's testimony that, during July or August, Rawls referred to two other employees as ''troublemakers.'' Bennett admitted on cross-examination that Rawls made no reference to the union activities when doing so.

Calling employees ''troublemakers'' in express, or implicit, reference to their protected activities may constitute a threat, as the Board has often held. However, there is no authority for the proposition that the use of the word ''troublemaker(s)'' is a per se violation of Section 8(a)(1), and that is the holding that the General Counsel, in effect, requests.

The expression of an opinion is protected by Section 8(c) of the Act, as long as it ''contains no threat of reprisal or force or promise of benefit.'' That is all that has been proven that Rawls did here. I shall, therefore, recommend dismissal of this allegation of the complaint.

2. Alleged 8(a)(3) violations

a. *The prima facie cases*

The law is that the General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other concerted activity that is protected by the Act was a motivating factor in Respondent's action that is alleged to constitute discrimination in violation of Section 8(a)(1) or (3). Once this is established, the burden shifts to Respondent to come forward with evidence that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have

taken place in the absence of the employee's protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Therefore, the first issue under *Wright Line* is whether the General Counsel has presented prima facie cases in regard to the terminations of Bennett and the construction technicians. Knowledge of the union sympathies of the construction technicians and Bennett was admitted. Green testified that labor consultant Peddrick told the supervisors not even to bother with the construction technicians because they were so prounion. Conner admitted that Peddrick had concluded that ''pretty much everybody'' in the construction department was in favor of union representation. Rawls testified that he knew that Bennett was prounion, and Conner testified that, when Cicatello recommended the termination of Bennett, Cicatello also ''point[ed] out that the perception would have been that it [the discharge] was [anti] union.''

Antiunion animus could hardly be more clear. Cost and legality were small obstacles to this Respondent. The double and triple percentage wage increases given to the unit employees bespeak of nothing but raw vote-buying. The announcement of the direct deposit program, almost 2 months before it could be implemented but only 1 week before the election, was so crude a violation that I can only conclude that Respondent had decided that it could not win the August 10 election otherwise, and it would be better to take its chances at a rerun. Again, the law was a small obstacle.

Specific animus toward any employee, or group of employees, is not a necessary requirement for the establishment of a prima facie case, but that element is here also. As Green testified, immediately after the August 10 Election Personnel Director Kelly said (twice) that he would be disappointed if the construction technicians were still employed in the following year. There is no reason that Kelly would have said that, other than the known union sympathies of those employees. Also, as I have found, Bennett's continuing allegiance to the Union was of such concern that, in spite of occasional instructions to the contrary, Rawls and Donahue felt constrained to interrogate her.

I find that the General Counsel has established a prima facie case that Bennett and the construction technicians were discharged because of their known or suspected union sympathies.

b. *Defenses and conclusions*

(1) Terminations of the construction technicians

It is clear that, at the time of this case, the construction activity was in a state of decline.[69] On December 31, 1989, Respondent laid off the remaining design engineers in the construction department. On January 29, 1990, Donahue wrote the city of Philadelphia stating that Respondent's construction activities were between 95- and 99-percent complete. New-builds, which the construction technicians followed, had reduced drastically. Yet, there is no evidence that the classification of construction technician had been slated for extinction before the Teamsters' 1989–1990 organizational attempt. The local management, from Vice President Conner to Firstline Supervisor Tucker, did not know before hand that the construction technicians were to be eliminated. The employees may have had a suspicion that something was coming, but this may have been because they knew that they were not receiving as many work assignments (and they had no reason to know that Respondent had already contracted with Adderly to do ''a majority'' of their work, as Cicatello testified).

At the time that the design engineers were terminated, the construction technicians inquired about the job security of their jobs. Doyle told the construction technicians that he could only state that they were in the 1990 budget. He did not tell them that they would also be terminated, and, indeed, Respondent transferred three additional employees (Funchness, S. Gardner, and Stevenson) into the construction department after the layoff of the engineers.

And then there came a time that the 1991 budget was to be prepared. This was in October or November 1990 according to Doyle. As I have found above, the construction technicians were in that budget. Doyle testified that certain financial reports affected all of his thinking during the process of deciding to terminate the construction technicians. However, the same reports showed that other departments vastly overspent their 1990 budget, and the construction department had not come close to exceeding its 1990 budget. Moreover, except for Bennett (whose termination I also find violative) the impact of the supposed economic crackdown fell only on the construction technicians; and, except for Bennett, the record does not demonstrate that, companywide, any other employees were involuntarily terminated in 1991.[70]

Other than the conflicting financial reports on which Doyle supposedly relied, Respondent points to nothing that it knew of on February 8, 1991, that it did not know when the construction technicians were placed in the 1991 budget, except for the January 14 analysis by Donahue. Therefore, the entire defense rests on the Donahue analysis, as I shall call it.[71]

I note about the Donahue analysis: (1) Even crediting Respondent's account of when it was created, it was an exercise in self-justification; by the time it was supposedly submitted, Respondent had already signed a contract with Adderly. (2) It was inflated by the costs of employing nonconstruction-technician Bennett during the August–October 1990 period.[72] This fact, which Donahue acknowledged as error, would change the $4100 subcontracting ''savings'' to a loss of $3,774.62 during the period. (3) Even taking it at face value, the Donahue analysis showed that Respondent would save far less than it would have saved by eliminating the installa-

[69] Although I agree with Respondent on this point, I am constrained to state that I place no reliance on its Exh. 25, which cross-examination of Doyle demonstrated to be worthless.

[70] The penultimate sentence of Respondent's elaborate brief emphasizes that many ''positions'' were eliminated in 1991. Again, that meant attrition, except for the seven prounion employees involved here.

[71] Donahue's quoted cross-examination confirmed that assumptions based on his analysis resulted in ''elimination of the entire construction staff.''

[72] As noted, the total of Bennett's August–October wages and benefits was $7,874.62. This is $3,774.12 more than the $4100 savings indicated by Donahue.

tion department (which was not eliminated).[73] (4) The Donahue analysis made its comparisons without supporting data other than the chimerical ''point'' system employed by Donahue.[74] And (5) only the Adderly ''menu'' prices for splicing were examined, not the Adderly prices for the rest of the unit work that was being contracted out. At minimum, these factors distinguish *Chromalloy American Corp.*, 286 NLRB 868 (1987), cited by Respondent, where contracting was done after ''a careful analysis.''

Nor can Respondent argue successfully that, even if otherwise fatally flawed, the Donahue analysis served as a good-faith, albeit mistaken, belief that Respondent could save money by contracting out the remaining construction technicians' work. In the first place, even if there had been probative testimony to support this argument, it would have been belied by the fact that the contract with Adderly to do the construction technician work was signed in November or December 1990, 2 weeks (or more) before Donahue supposedly submitted the January 14, 1991 analysis. Therefore, the Donahue analysis was not the basis of the subcontracting decision. But the probative testimony is missing also; Conner testified that the decision to terminate the construction technicians was made because that analysis showed that ''there obviously was not sufficient work to justify keeping the construction group on board.'' However, the Donahue analysis did not say that there ''was not sufficient work to justify keeping the construction group on board.'' The Donahue analysis stated that, whatever amount of work there was to be done, it could be done cheaper by an independent contractor.

Assuming that the conclusion that Conner advanced could be read into the Donahue analysis, I do not believe that it was the basis for the decision to terminate the construction technicians on February 8, 1991. I do not believe that the Donahue analysis existed even as late as February 6.

Nowhere in his January 18 memorandum telling Conner to take a look at ''in-house'' and ''contract'' labor does Doyle mention the 41-page Donahue analysis as something to be considered by Conner. It is inconceivable that Doyle would have failed to have mentioned the Donahue analysis if he then expected Conner to consider it. (This is especially true because Conner was new to the industry, and he probably would have wondered what avenue his investigation should make.)

But more importantly, Conner's January 25 memorandum to Doyle does not mention the Donahue analysis. In fact, it plainly states:

> As you know, the analysis of our cost for in-house versus contract labor in the installation, service and construction areas are at various stages of completion.

I find fantastic the explanation of Conner that by the above, plain, language he meant that he needed to get counsel from Gillert. There is only one logical interpretation of Conner's sentence; the ''January 14, 1991'' Donahue analysis had not been completed by January 25.

Conversely, Conner's January 25 memorandum does tell Doyle that he plans to eliminate persons other than the construction technicians. Conner tells Doyle that he intends to reduce the number of customer service representatives; he plans to eliminate some direct sales personnel; and he plans to eliminate ''at least one position'' in the local origination department.[75]

If Conner was even thinking about eliminating the construction technicians, he would have so indicated to Doyle in this memorandum; he would have been thinking about eliminating the construction technicians if he had seen the Donahue analysis; he would have seen the Donahue analysis if it had been given to him by Doyle; and Doyle would have given the Donahue analysis to Conner if it had existed before January 25.[76]

Finally, further fortification for the conclusion that the Donahue analysis is a post hoc creation lies in Doyle's February 6 memorandum to Conner. That memorandum, written just 2 days before the layoffs, does not mention the Donahue memorandum or any corporate decision that was based on that memorandum. It does not tell Conner to do anything. It says that it includes items that Conner ''should feel free to add or delete from.'' It further says that the items ''are meant as an outline for our future discussions,'' and that Conner should ''review these and give me a call when you feel comfortable about discussing these issues.'' Such language bespeaks of a pressing urgency of nothing; it is completely inconsistent with the supposed imperatives that Doyle had previously issued to Conner; and it compels the conclusion that Doyle's testimony about such previous imperatives, written and oral, was false.[77]

It appears to me that the Donahue analysis was finalized at some point after creation of Doyle's memorandum of February 6; then the Donahue analysis was seized on as a pretext for terminating the construction technicians on February 8. However, I need not decide precisely when the ''January 14, 1991'' Donahue analysis was created. It suffices to say that it was not created when Respondent said it was, and, even if it was, the Adderly contract had already been executed. Therefore, the multiflawed Donahue analysis could not have been the basis, good faith or otherwise, for the decision to terminate the construction technicians as Respondent contends.

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[73] Donahue's report on installation concluded that $130,000 could be saved annually by contracting out that work. Doyle testified that this was decided against because that was a high turnover position and attrition would take care of the excess. I do not believe that testimony. Certainly, it was inconsistent with the fact that Respondent granted the installers a 9.10-percent wage increase only months before in order to stanch the turnover in that position.

[74] Some jobs that would have identical summary descriptions would have different time requirements. Use of such a system would be analogous to assigning ''points'' for writing a ''Brief to the NLRB'' with no consideration of the difficulty of the particular case.

[75] Conner makes only the vaguest reference to other ''opportunities'' to reduce personnel costs in the future; and even then, Conner concludes, ''My expectation is that much but not all of the change in head count can be achieved through attrition.''

[76] Conner had approved the discharge of Bennett as an unneeded bench technician 1 month before the terminations of the construction technicians. Perhaps, if he had really seen the Donahue memorandum before February 8, Conner would have noticed that Bennett was included in the cost of operating the construction department.

[77] Although Conner was, as his testimony reflects, coerced into having ''shared'' in Doyle's decision to terminate the construction technicians, Conner was not asked to corroborate Doyle about their supposed discussions on the issue: he would have been asked if they had occurred.

The construction technicians were in the 1991 budget that was composed in October or November 1990. The spurious Donahue analysis aside, Respondent knew nothing in February 1991 that it did not know in October or November 1990, except for the fact that the Regional Director had, on November 28, 1990, issued an order that would assuredly[78] lead to a new election. Respondent had ''won'' the August 10 election by two votes; six of the votes against it, as Respondent knew or suspected, came from the construction technicians. I find that, as General Counsel contends, the answer that Respondent found was to eliminate the construction technicians sooner, rather than later.

I also agree with the General Counsel that the construction technicians were victims of discriminatory treatment. When the engineers were terminated on December 31, 1989, they were first given 6 weeks' notice. Before that, according to Donahue, their ranks were reduced by attrition. The construction technicians, however, were given ''the bum's rush.''

Kelly and Conner testified that they did not know of the better treatment given to the engineers. This may have been true, but, at least according to this record, they did not ask anyone who was around in 1989 either. Doyle was the one who gave the engineers 6 weeks' notice; he certainly could have told Conner and Kelly what had happened. It is clear from Respondent's testimony that Doyle was ordering the termination of the construction technicians; it is also most likely that he ordered how the terminations were handled, crudely.

I find and conclude that Respondent has failed to come forward with probative evidence that it would have discharged the construction technicians on February 8, 1991,[79] notwithstanding their known union sympathies. I conclude that by the discharge of the six construction technicians Respondent violated Section 8(a)(3) of the Act.

(2) Termination of Bennett

Respondent suggests no legitimate reason Donahue would have included Bennett along with the construction technicians in his analysis, and I believe that the Donahue analysis was simply a scenario of how Respondent could justify terminating a certain seven employees. What those employees had in common, at least according to this record, was nothing other than their prounion sympathies.

Respondent's evidence is nothing more than a post hoc rationalization for distributing her bench technician duties among other employees, something that, in any large organization, could be done with any number of employees at any time.

Bennett is obviously an intelligent person; Respondent used her to do engineering design work after it laid off the design engineers on December 31, 1989.[80] I do not believe that it could not have used her substantial potential in some method, even if the duties of bench technician could have been reallocated.

The only reason that it did not do so, I find and conclude, is her union sympathies, about which Rawls and Donahue inquired.

Accordingly, I find and conclude that Respondent also discharged Bennett in violation of Section 8(a)(3) of the Act.

THE REMEDY

A. *Bargaining Order*

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the Supreme Court approved as a remedy for ''outrageous'' and ''pervasive'' unfair labor practices a bargaining order as a remedy, even without a showing that the union involved ever possessed evidence that it was once the majority representative of the unit of employees that has been affected by such unfair labor practices. The Court also approved the use of the bargaining order in situations it described at 614–615:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (*or a fair rerun*) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order, then such an order should issue. [Emphasis added.]

Therefore, in cases where a union has attained a majority status, as evidenced by written authorizations to act as employees' collective-bargaining representative, and that majority status is likely to have been dissipated by such employer conduct as described by the Court, the Board has found it ''within our remedial authority to require an employer to bargain as of the date it embarks on an unlawful course of conduct which fatally impedes the holding of a fair election [or fair rerun],'' even if a separate violation of Section 8(a)(5) has not been proved because there was no request for recognition. *Peaker Run Coal Co*., 228 NLRB 93 (1977). Such bargaining orders have been consistently enforced by the courts.[81]

[78] Again, under *R. Dakin & Co*., 284 NLRB 98, the announcement of the direct deposit program alone was a guarantee that the August 10 election would be set aside if Respondent lost, as Respondent assuredly recognized when it made the announcement.

[79] It is further to be noted that on this date all the construction technicians had been assigned, and were expecting to perform, construction work.

[80] And she was given a 17.4-percent wage increase only 8 months before her termination.

[81] See, for example, *NLRB v. Eagle Material Handling*, 558 F.2d 160 (3d Cir. 1977).

1. The Union's majority status

As noted above, the appropriateness of the unit has been previously decided by the Board. Therefore, the next issue to be addressed is: Did the Union ever possess a card majority in that unit, and, if so, when?

The parties stipulated that on the petition date, March 22, there were 92 employees in the unit. Respondent stipulated to the authenticity of 66 employee signatures each of which was placed individually on a Teamsters authorization card or collectively on a Teamsters ''petition.'' Each of the cards received in evidence recites:

TEAMSTERS LOCAL 115

> I, the undersigned, of my own free will, desire to become a member of Local 115, Affiliated with I.B.T.C.W. and H. of A., and by so doing designate said Union as my chosen representative in all matters pertaining to wages, hours and working conditions.

Each of the petitions has, at the top, in bold face type, the same wording. Following that wording, the petitions have columns for date, name, address, telephone number, and signature, and there are 12 rows that provide ample space for the requested information. Many employees signed several of these petitions; many signed an authorization card and one or more petitions.

Although Respondent stipulated to the authenticity of 66 employee signatures on authorization cards or petitions, Respondent nevertheless denies that the General Counsel has proved that the Union ever possessed evidence of majority status. To take this position, Respondent first argues, after making some rather obvious statements about the rules of evidence:

> Yet, General Counsel proffered no evidence that the documents had affixed to them [the] typed statements of purpose *when the employees signed them*.[82]

The submission of such an argument is disappointing.[83] Respondent also argues that the cards and petitions are hearsay and not valid evidence of majority status. These alternate arguments ignore the law to the contrary, as stated by the Supreme Court in *Gissel*, supra.[84]

Sixty-five of the 66 employee signatures, either on an authorization card or a petition, are dated between October 29, 1989, and March 22.[85] I conclude that, by March 22, 1990, the Union had been designated as the collective-bargaining representative of the unit employees.

[82] Br. 182; emphasis in the original.

[83] For the benefit of any who may have made, or might take, this argument seriously, I will point out that, presumably, the employees would not have completed (in groups or individually) otherwise blank pieces of paper calling for their signatures, any more than they would have completed and signed checks without indication of payee.

[84] Needless to say, the subsections of Respondent's brief that contain these arguments (VII,A,1–3) do not cite *Gissel.*

[85] The exception is that of one employee whose earliest signature appears on an authorization card dated April 19, 1990.

2. Appropriateness of a bargaining order

The next issue is whether the extent of the proven unfair labor practices requires a bargaining order remedy. I find that it does.

Respondent's first unfair labor practice after the Union attained majority status was the wage increase of May 28. In 1989, the employees received wage increases of 5 percent, or less, pursuant to the compensation program that Respondent instituted that year.[86] Then, in the heat of the 1990 Teamsters campaign, they received, without explanation (even the false ones advanced here), up to triple the percentage wage increases that they had gotten in 1989. The inference could not have been missed by the employees: Respondent was buying votes. As the tally of ballots reflected, some employees were willing to sell, either from hopes for future wage increases, or from fears of ''a fist inside the velvet glove.'' There is no other explanation, aside from Respondent's other unfair labor practices, for the atrophy of the Union's 70 percent signatory majority on March 22 to a two-vote ballot minority on August 10.

I would conclude that, standing alone, Respondent's conduct in regard to the May 28 wage increase would require a remedial bargaining order. The impact of such extraordinary wage increases has been recognized by the Board as one that endures and one that requires a bargaining order to assure uncoerced majority choice. As stated in *Color Tech Corp*., 286 NLRB 476, 477 (1987):

> Wage increases in particular have been recognized as having a potential long-lasting effect, not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees. *Red Barn System*, 224 NLRB 1586 (1976), enfd. mem. 574 F.2d 315 (6th Cir. 1976).

And see *Big Star No. 185*, 258 NLRB 300 (1981), where similar percentage wage increases were found to warrant a bargaining order.

The coup de grace for any remaining uncoerced employee choice, of course, was the announcement of the direct deposit benefit, 7 days before the August 10 election but almost 2 months before it could be implemented. As Conner stated, the employees had ''[s]ome time back'' asked for the program. They had not gotten it. They had not even been told that Respondent was ''working'' on it, at least according to this record. But then the election was 1 week away. Acting on a wish to assure the unit employees that its vote buying was a continuing process, if not acting from desperation engendered by the belief that it could not win the election lawfully, Respondent announced the benefit. Standing alone, such conduct would invalidate any election,[87] and it fortifies my conclusion that a bargaining order is required here.

Respondent's final unfair labor practice was the extirpation of those employees who first contacted the Union and who,

[86] Again, many of those who received 5 percent did so, not pursuant to the program, but pursuant to complaints after Hipple's *mistaken* promise during the 1989 presentation. See Doyle's testimony on the point.

[87] Again, see *R. Dakin & Co*., supra, where the grant of a benefit of no monetary value (change of pay period) was the sole cause of the election being set aside.

thereafter, formed its core support, the construction technicians. In circumstances not nearly as brutal as those found here, the Board in *Panchito's*, 228 NLRB 136 (1977), relied on the manner of discharge of one Hull, almost exclusively,[88] as evidence of the need for a bargaining order:

> The precipitous nature of Hull's discharge must have brought his termination to the attention of the other employees, even if he himself did not do so. In these circumstances, Hull's discharge had a far-reaching effect, the meaning of which could not have been lost on them: support the Union and lose your job.[89]

The manner that the construction technicians were ejected demonstrates that nothing less could have been intended here.

For these, and the other, unfair labor practices, a remedial bargaining order is required, as I find and conclude.[90]

That is, in light of the above findings and conclusions, the union authorization cards and petitions executed by a majority of the employees in the unit are a more accurate measure of the free and uncoerced desire on the issue of representation than a second election would be. Accordingly, I conclude that the Respondent's bargaining obligation arose as of May 28, 1990, the date it embarked, through the wage increases of that date, on its course of conduct designed to destroy the Union's majority status that had been established by that date, and I shall therefore order it presently to bargain with the Union, on request, concerning any term or condition of employment, or change thereof, of the unit employees as to which it would have been required to bargain had the Union been recognized as the collective-bargaining representative of the unit employees on May 28, 1990.

B. *Other Necessary Remedies*

Having found that the Respondent has engaged in certain additional unfair labor practices, I find that it must be ordered also to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged employees Lynetta Bennett, Carmen Favano, Eric Funchness, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as required in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[91]

ORDER

The Respondent, Comcast Cablevision of Philadelphia, L.P., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting to its employees wage increases or wage reviews, in order to discourage its employees from becoming or remaining members of, or giving assistance or support to, Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.

(b) Promising to grant to its employees direct payroll bank deposit benefits, promotions, or any other benefits, in order to discourage its employees from becoming or remaining members of, or giving assistance or support to, the Union.

(c) Interrogating any of its employees about their membership in, or preference or support for, the Union.

(d) Telling employees that they may not wear union buttons or other indicia of their union support.

(e) Discharging, or otherwise discriminating against, any employee because of his or her union or other protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with Teamsters Union Local No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive collective-bargaining representative of all the employees in the bargaining unit described below, and, if an understanding is reached, on request, embody such understanding in a signed agreement:

> All full time and regular part time installers, service technicians, construction technicians, QC technicians, QA technicians, line technicians, bench technicians, warehousemen, converter prep employees and vehicle technicians employed by [the Respondent] at its 11400 Northeast Avenue and at its 4400 Wayne Avenue, Philadelphia, Pennsylvania locations, excluding cost analysts, clerks, secretaries, dispatchers, bracket access coordinators, MDU coordinators, tech administrators and facilities clerks employed in the Engineering Department, Customer Service Department employees, Marketing/Sales Department employees, Human Resources Department employees, Advertising Sales Department employees, Accounting Department employees, Local Origination Department employees, guards and supervisors as defined in the Act.

(b) Offer Lynetta Bennett, Carmen Favano, Eric Funchness, Richard Gardner, Steven Gardner, Marshall Stevenson, and Murray Wilson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, all in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharges of Lynetta Bennett, Carmen Favano, Eric Funchness, Richard Gardner, Steven Gardner, Marshall Ste-

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[88] In addition to the one discharge, the only other unfair labor practice was one act of surveillance.

[89] The Board's Order was enforced by the Ninth Circuit at 581 F.2d 204 (1978).

[90] My findings of March 1990 unfair labor practices accordingly become alternate bases for setting aside the August 10, 1990 election.

[91] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

venson, and Murray Wilson, and notify them, in writing, that this has been done and that their discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Philadelphia facilities copies of the attached notice marked ''Appendix.''[92] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found here.

IT IS FURTHER RECOMMENDED that the election in Case 4–RC–17321 be set aside, and that the petition in Case 4–RC–17321 be dismissed.

[92] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''